Supreme Court, U.S.
FILED

93-1275 FEB 7 1994

No. 93-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

CECIL B. JACOBSON, JR., M.D.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

## PETITION FOR WRIT OF CERTIORARI

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February 7, 1994

78 pp

## Questions Presented for Review

1. Can the federal mail, wire, and travel fraud statutes be applied to regulate the professional practice of medicine through federal criminal prosecution?

2. In a federal criminal prosecution for perjury and for mail, wire, and travel fraud, can a finding of criminal intent be predicated upon a jury's choice between conflicting expert opinion testimony as to matters of scientific theory and appropriate medical treatment?

3. Is the Fourth Circuit's *per se* rule against jury instructions defining the reasonable doubt standard consistent with federal criminal law and the Due Process Clause of the Fifth Amendment?

4. Is anonymous testimony by disguised prosecution witnesses consistent with the accused's rights under the Fifth and Sixth Amendments to confront his accusers in a fair and public trial, where the prosecution witnesses are competent adults who are under no threat of physical harm and are not victims of violent crime, but merely wish to avoid the alleged "stigma" of their association with the accused?

5. What are the standards governing the evidentiary basis for, and permissible extent of, an upward departure from the federal sentencing guidelines?*

6. Does the consideration of the same relevant conduct in imposing both a guidelines and a pre-guidelines sentence violate the Ex Post Facto or Double Jeopardy Clauses of the Constitution?

7. In a federal criminal prosecution, is there any limitation on the power of a court of appeals to ignore the main issues presented by the parties, and to render an unpublished decision?

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* If the Court grants review on this question, it also should grant review of the guidelines application issues presented in the court of appeals, in order to effectively review the permissible extent of the upward departure in this case.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner Cecil B. Jacobson, Jr., M.D., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

## Opinions Below

The opinion of the court of appeals upon the rendering of its judgment (1a-11a)[1] is not published in the Federal Reporter, at that court's direction. However, it is available in the LEXIS service at 1993 U.S. App. LEXIS 22534. The district court's decision permitting prosecution witnesses to testify anonymously at trial (16a-24a) is reported at 785 F. Supp. 563 (E.D. Va. 1992).

## Jurisdiction

The judgment of the court of appeals was entered on September 3, 1993 (1a). An order denying rehearing was entered on November 8, 1993 (27a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] Citations to "-a" are to pages of the appendix to this Petition. Citations to "JA-" are to pages of the Joint Appendix in the court of appeals.

## Constitutional, Statutory, and Regulatory Provisions Involved

The pertinent texts of the Ex Post Facto Clause (art.I, § 9, cl.3), the First, Fourth, Fifth, and Sixth Amendments to the Constitution, 18 U.S.C. §§ 1341, 1343, 2314, 3553, and 3742, and U.S.S.G. §§ 1B1.3, 2F1.1, 2J1.3, 5K2.3, and 5K2.8 & official commentary thereto, are set forth in the appendix to this Petition (28a-35a).

## Statement of the Case

This case involves an unprecedented and highly publicized federal criminal prosecution against an eminent physician and scientist, Dr. Cecil B. Jacobson, who was and is a scientific pioneer in the fields of human infertility and genetics, and is recognized as such in the international scientific community.

The government's case against Dr. Jacobson rests critically on the assertion that Dr. Jacobson's methods of infertility treatment, and his demonstrable scientific theories, can be labeled as a crime under the federal mail, wire, and travel fraud statutes merely because a federal jury disbelieves Dr. Jacobson's scientific theories and instead believes competing conclusions advanced by government-hired expert witnesses at trial.

As a result, this case presents, so far as we are aware, the first and only instance in which a state-licensed physician has been convicted of federal criminal fraud on the basis of a direct governmental attack on the professional practice of medicine itself, i.e., on the provision of medical services by a physician to patients in the course of a private medical practice. Indeed, aside from Prohibition-Era enforcement under the special authority of the Eighteenth Amendment, we believe that this is the first and only case in which a physician has been convicted of *any* federal crime on the basis of any conduct that has not been shown and found, under appropriate jury instructions of the type that were refused here, to have been outside the scope of the professional practice of medicine. To the contrary, both this Court and other federal courts consistently have held that the practice of medicine is not subject to federal regulation.

Therefore, the theory of prosecution in this case presents questions of profound importance to the division of authority

between federal and state governments--and between governmental power and personal autonomy--in our constitutional system.

*First*, the prosecution here is yet another example of the ever-expanding uses of the federal mail fraud and related statutes by federal prosecutors to both federalize and criminalize the regulation of activities that previously have been governed exclusively by state law, in this case, the practice of medicine. Whether Congress intended the mail fraud statute to be put to that use, and whether it could constitutionally be so applied, are important questions of federal law that should be settled by this Court.

*Second*, the prosecution's method of proof of "fraudulent" intent by reference to conflicting expert opinion testimony presents the question whether criminal liability under the mail fraud statute can ever be based on a fact-finder's choice between disputed scientific opinions. Specifically, this raises the question whether this Court's prior decision in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), which construed the mail fraud statute to exclude such liability, remains authoritative.

In addition to these questions, the wholly extraordinary proceedings in the courts below raise several questions of fair process, procedure, and sentencing that warrant this Court's attention as presenting important questions of federal law that have not been settled by this Court and that either present conflicts among lower court authority or call for an exercise of this Court's power of supervision:

*Refusal to Define Reasonable Doubt*. The district court followed established Fourth Circuit authority in refusing to instruct the jury on the definition of the reasonable doubt standard of proof. That rule also is followed by the Seventh Circuit, but is rejected by other courts of appeals, thus presenting a conflict of circuits on this important element of fair criminal procedure that should be resolved by this Court.

*Confrontation and Fair Trial*. The district court permitted prosecution witnesses to testify at trial under assumed names and in disguise, for reasons that have never been recognized by this Court or any other court as sufficient to abridge an accused's rights to a fair public trial in which he is entitled to confront his accusers. This Court should review the constitutionality of this procedure

under the Fifth and Sixth Amendments.

*Sentencing: Upward Departure and Double Jeopardy.* Dr. Jacobson's sentence to five years' imprisonment involved both a significant upward departure from the guidelines sentence and dual sentencing under both guidelines and pre-guidelines law based on the same conduct. Both subjects present conflicts of authority in the circuits, and the upward departure issues bear on a matter of fundamental importance to the success of the determinate sentencing system envisioned by the Sentencing Reform Act of 1984.

*Unarticulated Decisions in the Courts of Appeals.* Finally, the court of appeals' decision on appeal in this case raises supervisory questions of broad importance to the federal judicial system, particularly in criminal cases. The court of appeals' decision was designated as "unpublished" by that court, and it fails to discuss any of the main issues briefed and argued by the parties, including all of the issues set forth above, with the sole exception of the upward departure on sentencing. This action raises the question whether there is any minimum standard for the quality of appellate justice in the federal courts. Some 20 years of experimentation with reliance on local rules and practices have not produced satisfactory or consistent results. This Court should review the question whether the courts of appeals are in need of uniform guidance on this subject from this Court.

**Dr. Jacobson and Medical Science**

The target of the government's prosecution in this case is Dr. Cecil B. Jacobson, a distinguished physician and scientist. Following his graduation from medical school in 1964, Dr. Jacobson spent much of the next 24 years in scientific research, teaching, and medical practice in the fields of human infertility and genetics.[2] He has been a member of the President's Committee on Mental Retardation, a consultant to the federal Food and Drug Administration, and the recipient of numerous fellowships, awards,

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[2] From 1968 to 1978, he was a member of the faculty of the George Washington University School of Medicine and he developed a graduate program in human genetics at that same University. In 1969, 1970, and 1974, he was a guest scientist at the Reproductive Physiology Unit of Cambridge University.

and recognitions. He is the author of some 70 published scholarly papers in a variety of medical and scientific journals, including *Science*, *Journal of the American Medical Association*, *Lancet*, and *New England Journal of Medicine*.

Throughout his career, Dr. Jacobson has worked at the forefront of medical science, and, as a result, has been involved in scientific controversies from time to time. Dr. Jacobson generally is credited with pioneering the use in the United States of the amniocentesis procedure for the diagnosis of genetic defects in unborn children. Like most new ideas, the amniocentesis procedure--which involves inserting a needle into a pregnant woman's uterus--was controversial at the time of its introduction in the 1960's. Critics claimed that the procedure was dangerous, and could lead to infections and miscarriages. However, Dr. Jacobson believed that the procedure was safe and effective, and continued his work. Eventually, most of the critics were converted by the accumulation of evidence in support of Dr. Jacobson's views. Today, the amniocentesis procedure is widely accepted and routinely performed.

Dr. Jacobson's work in the medical treatment of human infertility is following the same pattern of development as his earlier work on amniocentesis, with one exception: his professional critics have been joined by the federal government, which has invoked the coercive force of the criminal sanction in a scientific debate.

In 1976, Dr. Jacobson established a private practice of medicine in Vienna, Virginia, while continuing his research and teaching activities. The bulk of Dr. Jacobson's practice was devoted to amniocentesis, but he also began treating private patients for infertility, in accordance with theories he had developed from his prior research.

Dr. Jacobson's theory of infertility focused in part on the idea that a substantial percentage of all pregnancies--much larger than conventionally believed--end in spontaneous "abortion" (the medical term for miscarriage) early in the term and without detectable signs, as the fetus would "resorb" (re-absorb), meaning essentially to dissolve within the uterus. Dr. Jacobson believed that this effect occurs much more frequently in women with fertility problems, who therefore are "habitual aborters." Dr. Jacobson believed that he

could treat this condition by using the hormone HCG[3]--which is secreted by the human placenta during pregnancy--both to stimulate ovulation (the release of the egg from the Fallopian tubes) and to "support" the implantation and growth of the fetus after fertilization.

Dr. Jacobson applied his theories to develop a method of infertility treatment involving multiple injections of HCG both before ovulation and after fertilization. During the 12-year period called into question by the government's prosecution--from 1976 through 1988--he treated some 1,000 infertility patients by this method, and achieved approximately 400 live births from this group. Excluding multiple births to the same patient, Dr. Jacobson's success rate of about 30% was among the highest for any infertility treatment, particularly considering that most of his patients were referred from other physicians, many after having been treated unsuccessfully by other fertility specialists.

Dr. Jacobson's treatment was not the standard approach for infertility, although it is difficult to speak of a "standard" during the late 1970's and early 1980's, when infertility was still an emerging field characterized by very rapid changes. The more common treatment was to inject HCG/drug combinations to stimulate ovulation, and to ignore the role of HCG after fertilization.

Ordinarily, the conflict between Dr. Jacobson's approach and rival theories would have been thrashed out over time in medical journals and at scientific conferences, as clinical and experimental data were accumulated, as had been the case with amniocentesis. As we will show below, that process in fact has continued during the proceedings in this case. As with amniocentesis, the scientific process now is confirming the prescience of Dr. Jacobson's theories. However, in the meantime, a highly publicized legal process--strangely involving the federal government--has intervened.

**Media-Governmental Investigations**

Though highly successful, Dr. Jacobson's methods of infertility treatment, like all others, leave a majority of patients disappointed. One or more such patients contacted a local television reporter, who ran an exposé-style media attack on Dr. Jacobson during 1988,

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[3] HCG stands for human chorionic gonadotropin.

which ultimately was picked up by the national "60 Minutes" program. The thrust of the media attacks was that the unsuccessful outcomes for the disappointed patients had involved "false" pregnancies induced by Dr. Jacobson's use of HCG.

Accompanying the media treatments were civil actions by former patients, proceedings before the Virginia state medical board, and a Federal Trade Commission action, which was brought in early 1989.[4] In the meantime, however, the United States Attorney for the Eastern District of Virginia had commenced a criminal investigation. During this phase, a new type of allegation against Dr. Jacobson surfaced, concerning the use of his own semen in artificial inseminations of his patients. When publicly disclosed, that allegation created a media frenzy, but actually has only marginal significance in terms of substantive legal analysis, as it formed the basis for only 4 of the 53 counts ultimately charged. However, it had a major bearing on the manner in which the case was investigated and tried by the government.

In pursuit of what became known as the "donor substitution" aspect of the case, the government, after seizing the records of Dr. Jacobson's patients, apparently contacted all or most of the some 75 patients who successfully had delivered children after receiving "donor" (non-husband) insemination between 1976 and 1988, and sought to induce those patients to submit to DNA testing in an attempt to match their children's genetic characteristics to Dr. Jacobson's. Although the full scope of the government's behavior remains unknown to the defense, one of the patients came forward shortly before trial, stating that the government falsely had told her that there was a "genetic defect" in the sperm donor, and therefore potentially in her child (*see* JA1548-60, 3132-35).

By whatever means, the government induced the parents to submit 16 children to the DNA matching with Dr. Jacobson's blood, which also was seized by grand jury subpoena, and produced DNA

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[4] All of these civil matters either remain pending or have been settled without any finding of fault or misconduct on the part of Dr. Jacobson, including both the state medical board and FTC actions. However, as a result of the settlement of the civil government proceedings, Dr. Jacobson has withdrawn from the clinical practice of medicine.

test results that "failed to exclude" Dr. Jacobson as the donor in 12 instances (*see* JA3235).

**The Government's Case Against Dr. Jacobson**

By a 53-count indictment returned on November 19, 1991 (JA9-94), and accompanied by a press release (JA2686-89), the government charged Dr. Jacobson with 33 counts of mail fraud under 18 U.S.C. § 1341, 10 counts of wire fraud under 18 U.S.C. § 1343, 4 counts of travel fraud under 18 U.S.C. § 2314, and 6 counts of perjury under 18 U.S.C. §§ 1621 & 1623,[5] all arising from Dr. Jacobson's practice of medicine.

The relationship between the conduct charged in the fraud counts (Counts 1-47), and the use of the mails, wires, or interstate travel was purely adventitious, consisting of such things as Dr. Jacobson's orders for HCG and pregnancy test kits (JA45-48), telephone calls made to Dr. Jacobson's office by patients (JA50-51), and the fact that some of his patients resided outside Virginia (JA53). In terms of the substantive conduct charged, the fraud counts fell into the two categories previously developed: (1) the "false pregnancy" theory, comprising 43 of the 47 fraud counts; and (2) the "donor substitution" theory, comprising 4 counts.

The "false pregnancy" theory was a direct attack on Dr. Jacobson's methods of infertility treatment, replete with medical detail in the indictment about appropriate dosages of HCG, sensitivities of pregnancy tests, sonogram technology, the known or speculated rates of miscarriage, and the like (JA14-33). In essence, the "false pregnancy" theory was that the repeated injections of HCG mimicked the signs of pregnancy and caused false positive results in standard pregnancy tests, which are triggered by the level of HCG in the urine, but that Dr. Jacobson somehow "knew" that these particular pregnancies were "false," and misrepresented that fact to his patients.[6] The indictment further alleges that Dr.

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[5] The district court's jurisdiction was invoked under 18 U.S.C. § 3231.

[6] The indictment did not explain, and no subsequent development of this record has explained, how Dr. Jacobson possibly could have separated the 10 patients named in the indictment from any of the other 1,000 of his fertility patients, nor even from the approximately 300 patients who delivered live births. An initial

Jacobson deliberately misread some of his sonographic examinations of these women to find evidence of pregnancy when in fact they were never pregnant, and fabricated the concept of "resorption" of a miscarried fetus.

The second species of fraud alleged in the indictment is the opposite of the first: that Dr. Jacobson succeeded in achieving a pregnancy when he should not have. This is the "donor substitution" theory of Counts 12-15 (JA33-37, 44) that attracted so much interest from the media. Legally, this theory is a species of fraud by "false promise," alleging that Dr. Jacobson's assurance of anonymity in donor inseminations should be interpreted to imply not only that the patients would not know the identity of the donor--a condition that indisputably was kept by Dr. Jacobson, and breached only by the government's intervention--but also that the donor would not know the patients. The government's theory is that this latter aspect of the implied undertaking was breached by Dr. Jacobson's use of his own semen in some cases. Here again, although the indictment could be read to imply that there were no other donors, that interpretation is foreclosed by the government's own DNA test results, which did exclude Dr. Jacobson's paternity in some cases.[7]

The six perjury counts of the indictment (Counts 48-53) are tag-alongs that charge Dr. Jacobson with committing perjury by defending his theories and methods from attack in the prior civil litigations brought by former patients and the FTC (JA54-94).

**Proceedings in the District Court**

The case was tried in February 1992, for 12 trial days involving

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reading of this portion of the indictment in isolation might lead one to believe that no patient ever achieved a pregnancy or a live birth from Dr. Jacobson's treatment, but that plainly is not the case, and it is contradicted by the second branch of the government's theory.

[7] Given that fact, this second theory also suffers from the defect--nowhere cured in this record--of failing to explain how Dr. Jacobson possibly could have formed the intent not to perform the promise at the time it was made, because it again does not explain how Dr. Jacobson was supposed to have chosen which patents would have a "true" or "false" donor.

112 witnesses, including 26 physicians or other experts.

At trial, the government's case rested critically on the use of expert opinion testimony to show Dr. Jacobson's allegedly "fraudulent" intent. The government's experts contended that Dr. Jacobson's use of HCG was "excessive" had "no medical justification" (JA1282-83, Dr. Margaret Damewood); they characterized his theory of resorption was "a bunch of crap" (JA892, Dr. Carl Douglas Lord), "beyond comprehension" (JA988, Dr. Glenn David Braunstein), and "unthinkable" (JA1264, Dr. Damewood). The government presented sonography experts to disagree with Dr. Jacobson's sonography results. In each instance, the government experts' opinions were disputed by qualified experts called by the defense.[8]

Thus, the trial of this case presented a "battle of experts" resembling a civil malpractice trial in a state court. But in fact it was a criminal trial in a federal court in which the defendant's liberty was allowed to turn simply on which side's experts the jury found more persuasive.

The district court also permitted the government to present 11 prosecution witnesses--the parents of the children involved in the "donor substitution" charges--to testify in disguise and under assumed names such as "Mrs. White" and "Mrs. Green," and the court directed that placards bearing the pseudonyms be erected in front of the witness box for those witnesses only.[9]

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[8] The two principal defense experts were both world-famous specialists from the United Kingdom: (1) Dr. Robert F. Harrison (vitae at JA2942-85), at that time the Secretary General of the International Fertility Societies and past Chairman of the Infertility Task Force of the World Health Organization; and (2) Dr. Stuart Campbell (vitae at JA2986-3063), at that time President of the International Society of Ultrasound in Obstetrics and Gynaecology, and, according to Dr. Harrison's testimony, "the world's expert" in sonography (JA1697). Both physician's supported Dr. Jacobson's treatment methods and diagnoses, and Dr. Campbell reviewed some 180 sonograms made by Dr. Jacobson(*see* JA1912-2037, JA2868(summary of findings as to prosecution witnesses)).

[9] These procedures had been ordered pursuant to a reported pretrial opinion (16a-24a), in which the district court ruled that the defendant's rights to confront his accusers publicly either were preserved or outweighed by "the compelling and overriding governmental interest in the psychological health of the [witnesses']

In instructing the jury, the district court rejected the defense's request for a definition of reasonable doubt (JA1069), as well as several instructions proffered by the defense that would have focused the jury's attention on the distinction between fraud and medical or scientific disagreement or mistake (JA1055-62).[10] Instead, the jury was charged under boilerplate instructions that gave no recognition to the unique context of the case (JA2471-2517),[11] and that were, as a whole, consistent with the district court's view, expressed during trial, that the issues for jury consideration included "whether there is such a thing as resorption of a fetus"(JA1260)--one of the scientific theories in dispute.

With those instructions, the jury returned verdicts of guilty on all 52 remaining counts on March 4, 1992 (JA2518-20).[12] On May 8, 1992, Dr. Jacobson was sentenced to five years' imprisonment on each count, to run concurrently (JA2614), plus various monetary penalties totalling some $120,000 (JA2613, 2616-17). Seventeen of the 52 counts of conviction were subject to the sentencing guidelines, while the remaining 35 counts were subject to sentencing only under pre-guidelines law. Nonetheless, all of the relevant conduct underlying all 52 counts was considered in applying the guidelines, producing an offense level of 20 and corresponding imprisonment range of 33-41 months, according to the presentence

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children" (21a). According to the district court's reasoning, "[i]f such a parent's true identity were disclosed in open court, it is likely that the child of this parent would learn the truth of his or her paternity." (21a). Pursuant to that opinion, the defense also was placed under a protective order prohibiting the disclosure of any information that could lead to the identification of these witnesses as witnesses in the Jacobson trial (25a-26a), thus, in practical effect, preventing the defense from conducting a thorough background investigation of the witnesses.

[10] The defense also moved for a judgment of acquittal as a matter of law (JA2522-32), which was denied (JA2567).

[11] Even on this basis, the instruction on good faith was so garbled that it said the opposite of the correct law (JA2497-98). On appeal, the government moved to alter the transcript, but that motion was denied provisionally (15a), and then apparently overlooked by the panel opinion. When the matter was brought to the panel's attention on rehearing, it was disregarded.

[12] The government withdrew one of the mail fraud counts prior to trial.

report.[13] But in sentencing Dr. Jacobson to 60 months, the district court departed upward by five additional offense levels and approximately 50% from the maximum guideline sentence, based primarily on letters received from Dr. Jacobson's former patients describing what the court interpreted as "extreme psychological injury" under §5K2.3 of the guidelines (JA2668-74).

**Proceedings in the Court of Appeals**

Dr. Jacobson appealed to the Fourth Circuit on May 15, 1992 (JA2685). On September 3, 1993, his convictions and sentences were affirmed in an unpublished per curiam opinion by a panel of the court of appeals (1a-11a). The panel's opinion failed to address most of the issues briefed and argued by the parties on appeal, including the first five issues raised by this Petition, all of which were raised, among others, in the court of appeals.

Instead, the court of appeals' decision discusses only two points: (1) whether the charged conduct satisfied the federal jurisdictional means of relationship to the use of the mails, wires, or interstate travel under this Court's prior decisions (a-a), which had consumed only about 2 out of the 130 pages of main briefing by the parties;[14] and (2) whether the upward departure on sentencing was warranted (a-a). Otherwise, the panel decision states that "Jacobson's remaining assignments of error are wholly without merit and therefore warrant no discussion on our part" (11a & n.6).[15]

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[13] The defense objected to the presentence report on the grounds, inter alia, that a correct application of the guidelines would produce an offense level of 12, or 10 after considering acceptance of responsibility (JA3443-57).

[14] Pursuant to requests by both sides, the court of appeals had granted leave to file oversized main briefs of 65 pages each (12a-14a).

[15] On September 17, 1993, Dr. Jacobson moved for rehearing of the panel's decision on the grounds that the panel had not resolved an open question on the content of the jury instructions given below (*see* note 11 above), had overlooked the applicability of prior decisions this Court, and had created intra-circuit and intercircuit conflict on the standards governing upward departures from the sentencing guidelines. Dr. Jacobson further suggested rehearing in banc, on the basis of the importance of the issues presented and the failure of the panel opinion to address the main points argued by the parties.

Although the court of appeals' opinion therefore provides very limited legal analysis of the questions presented, its restatement of the case demonstrates the centrality of the disputed expert opinion testimony to the government's theory:

> "Although HCG is legitimately used in the treatment of infertility, the Government's proof tended to show that Jacobson overexposed his patients to the hormone . . . ."

(a). Thus, the court of appeals' own statement confirms that the federal criminal fraud statutes now have become a means for federal supervision of a practicing physician's selection of the precise dosage and administration of a completely lawful substance properly used in medical treatment, with the physician subject to incarceration for exceeding the government-prescribed dosage, determined after the fact by a jury's choice among competing scientific opinion testimony. Whether that theory is a tolerable basis for applying the federal criminal fraud statutes is the threshold question presented by this Petition.

**The Progress of Medical Science**

While this case has been pending, new medical studies validating Dr. Jacobson's theories are being published in scientific journals.

In April 1992--the month between Dr. Jacobson's conviction in March and his sentencing in May--an article on reproductive medicine appeared in *Archives of Pathology and Laboratory Medicine*, stating that post-fertilization administration of hormones--including HCG and progesterone--was "known to affect implantation and further development of the implanted embryo," and therefore "many clinics support the luteal [post-fertilization] phase of stimulated [hormone-induced] cycles with progesterone or human chorionic gonadotropin [HCG], even though the value of such

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After requesting and receiving a response to the rehearing motion from the government, the court of appeals denied rehearing and rehearing in banc on November 8, 1993 (27a).

treatment has not been adequately documented."[16] Further documentation appeared in a July 1992 paper in *Fertility and Sterility*, reporting a new study conducted showing that "[r]epetitive administration of hCG during early gestation in cases that are at high risk of luteal inadequacy may significantly decrease the pregnancy wastage rate."[17] In the following month of August 1992, researchers at the University of Texas reported empirical findings that repeated, consecutive injections of stimulating hormones "are not detrimental and may, in fact, result in increased cycle fecundity [fertility]."[18] These were exactly Dr. Jacobson's theories--what the government's expert witnesses called "without medical justification" at trial, and the government's prosecutor called a "fraud" and a "scheme"--and yet they are now being borne out by empirical research, and are now appearing in standard medical texts.[19]

Similarly, new research has further documented the high incidence, especially in patients undergoing infertility treatment, of spontaneous abortion and "resorption."[20] Indeed, even the

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[16] K.S. Moghissi & R. Leach, *Future Directions in Reproductive Medicine*, 116 Arch Pathol Lab Med 436 (April 1992).

[17] Z. Blumenfeld & M. Ruach, *Early Pregnancy Wastage: The Role of Repetitive Human Chorionic Gonadotropin Supplementation During the First 8 Weeks of Gestation*, 58(1) Fertil Steril 19 (Jul 1992).

[18] K.M. Silverberg, et al., *Consecutive versus Alternating Cycles of Ovarian Stimulation Using Human Menopausal Gonadotropin*, 7(7) Hum Reprod 940 (August 1992).

[19] *See* J. Bonner, 17 *Recent Advances in Obstetrics and Gynaecology* 151 (1992); *see also* R.F. Harrison, *New Solutions to an Old Problem: hCG in the management of habitual and threatened abortion* (Excerpta Medica 1991). Harrison's 1991 monograph concludes by noting that "[e]xperimentation is . . . confirming its [HCG's] validity and it is therefore to be anticipated that ongoing and future research will . . . determine precise optimal dosages," *id.* at 15.

[20] A British study published in April 1992 found a 48% disappearance rate--based on sonographically-identified fetuses--in the "vanishing twin" type of resorption, which has been known for many years but previously was thought to be much rarer. Z. Blumenfeld & M. Dirnfeld, *Spontaneous Fetal Reduction in Multiple Gestations Assessed by Transvaginal Ultrasound*, 99(4) Br J Obstet

government's own expert witnesses may now be thinking the "unthinkable." Government expert Dr. Damewood, who testified at trial in February 1992 that Dr. Jacobson's use of HCG was "without medical justification" and his theory of resorption "unthinkable," presented a paper at a June 1993 medical conference, in which she acknowledged that the use of HCG alone is capable of achieving results comparable to the natural ovulation process.[21]

We refer to these facts here not so much to impeach the fact-findings in the courts below--although they certainly are an embarrassment to the American judicial process--but rather to illustrate the sheer folly of any legal rule that purports to determine the liberty or incarceration of any individual on the basis of the legal determination of ultimate scientific "truth" or an official view of what is or is not, in the word of the government expert Dr. Damewood, "unthinkable." In a free and open society, everything must be "thinkable"--no matter how unattractive the thought, or the thinker--and thoughts must not be punished.

Nor do we believe that this Court has ever endorsed a view that includes an official determination of scientific "thinkability" as a criterion for criminal punishment. To the contrary, we believe that the prior decisions of this Court reject any such concept as part of American law. But legal principles are only as strong as the willingness of the judiciary to affirm and enforce them, even--and perhaps especially--in unattractive circumstances.

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Gynaecol 333 (April 1992); *see also* A. Nelich, J. Wisser, & S. Krone, *Placental Findings in "Vanishing Twins"*, 52(4) Geburtshilfe Frauencheilkd (Germany) 230 (April 1992). Newly published research findings excluded from evidence by the district court in this case, but appearing in a peer-reviewed scientific journal, report a high rate of resorption (27%) in single pregnancies of assisted conception. V. Beral, et al, *Outcome of Pregnancies Resulting from Assisted Conception*, 46(5) Br Med J 753 (1990)(JA2758-66).

[21] M.D. Damewood, "Disappearance Rates of Exogenously Administered HCG or Endogenous LH," presented in *The Triggering of Ovulation in Stimulated Cycles: HCG or LH?*, Bourdeaux, France, 19-20 June 1993, available through Scientia abstracts.

## REASONS FOR ALLOWING THE WRIT

**I. This Court Should Review the Applicability of the Federal Mail, Wire, and Travel Fraud Statutes to Regulate the Professional Practice of Medicine, Which Has Never Been Subjected to Direct Federal Regulation under Any Federal Statute.**

We are now in the midst of a great national debate over the proper role of the federal government in our health care system. If new legislation is enacted by Congress, it is likely to make delicate tradeoffs in the various social interests involved, including the relationships among federal regulation, state regulation, and the autonomy of the medical profession and its patients. But if the theory of prosecution in this case is correct, the Congress should not bother with those considerations, because they were resolved *sub silentio*--in favor of federal preemption at the initiative of criminal prosecutors--by 1872 legislation that everyone thought at the time was limited to the use of the mails to perpetrate commercial frauds.

For that is essentially the government's theory of prosecution in this case: that the malleable language of the mail fraud and related statutes should be applied to federalize the regulation of yet another field of activity traditionally reserved to state law--in this case, the practice of medicine--and to do so not by administrative or civil means, or carefully balanced legislative design, but rather by ad hoc criminal charges by federal prosecutors. Permitting that theory of federal criminal prosecution has profound implications for the balance of power between federal and state law, and raises important questions of constitutional dimension concerning the authority of any government--state or federal--to interfere in the physician-patient relationship. Those questions should be reviewed by this Court before this case becomes the prototype for an entirely new expansion of the scope of federal criminal law.[22]

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[22] This agenda was made explicit by the United States Attorney in remarks to the media following Dr. Jacobson's sentencing:

> "We are pleased with the sentence. . . . The vast majority of doctors conduct their practice in an honorable and ethical fashion. This prosecution demonstrates, however, that when

The key legal distinction to be made in this case--and the one that the lower courts here refused to make--is the distinction between a sensible, administrable definition of fraud under the federal criminal fraud statutes and the improper federal regulation of medical practice. The Petitioner's point here is not that physicians as a class are "immune" from federal prosecution, but rather that the federal mail fraud statute cannot be applied in such a manner as to create substantive federal standards of professional medical practice, punishable by imprisonment for deviating from the "official" version of medicine.

The government's charges in this case sought to establish substantive federal regulation of medical practice. The government's "false pregnancy" theory was founded on the notion, as endorsed by the court of appeals, that Dr. Jacobson "overexposed" his patients to the HCG hormone, that he misdiagnosed sonograms, and that he misdiagnosed "resorption." All of these points require the premise that there is an underlying substantive standard of medical practice supplied by the mail fraud statute itself, which thereby becomes the vehicle for establishing--as a matter of federal criminal law--an "acceptable" dosage of HCG, a permissible range of interpretation of sonograms, and a constraint on "thinkable" theories of miscarriage, or, as the district court put it, a determination whether "there is such a thing as resorption." Even if limited to the idea that Dr. Jacobson should have been more guarded in his diagnoses--as, for example--by disclosing the prospect of "false positive" pregnancy test results, due to the HCG injections--the government's theory still invests the federal mail fraud statute with a substantive regulatory standard, by specifying the requisite contents of a federalized and criminalized version of the informed consent doctrine. Similarly, the government's "donor

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> a doctor lies to his patients about matters of fundamental importance he will be subject to prosecution, conviction, and imprisonment."

PR Newswire, May 8, 1992 (Remarks of Mr. Cullen). There could be no more explicit statement of the government's design to use the mail fraud statute to federalize and criminalize regulation of the practice of medicine in accordance with prosecutors' notions of what is "honorable" or "ethical."

substitution" theory also sets a federalized standard of required disclosures within the physician-patient relationship.

It may be tempting to view these matters as fact-bound considerations or jury questions. But that cannot be the case, because law is defined by what and how juries are instructed to decide. Where, as here, a jury is permitted to decide, solely on the basis of a federal statute and without constraining instructions, that a physician's prescription was an "overdose" or that a physician's diagnosis was "unacceptable" or "unthinkable," then the submission of such questions to a jury is a legal decision that imposes a substantive federal standard on medical practice itself. Allowing a jury to make such decisions in a federal criminal case is a wholly unprecedented interpretation of federal law, and one that would displace vast areas of state regulatory and civil tort law.

To illustrate the sweeping effect on state law, consider the everyday occurrence of a physician's prescription of a medical test or treatment involving a potential adverse reaction that is rare but serious when it does occur. Under the previously prevailing standards of the informed consent doctrine in most states' tort law, the physician would be expected to exercise her or his professional medical judgment as to what risks will be disclosed to the patient, and may responsibly decide not to disclose the rare adverse reaction, without liability.[23] Nonetheless, the physician in fact is "concealing" the truth, and therefore, under the prosecution's theory in this case, committing a "fraud." As against this standard, enforced by the threat of federal incarceration, the state law standards and their balance of competing social policies become completely irrelevant to the physician's conduct, which is now dominated by the threat of federal criminal prosecution.

There is no indication that Congress ever intended the mail, wire, and travel fraud statutes to be applied in this manner. Nor are we aware of any prior case in which those statutes have been applied to regulate in any way the professional practice of medicine. Prior prosecutions under those statutes have been limited either to commercial marketing of medical products outside the scope of

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[23] See, for example, the statement of Virginia's doctrine in Bly v. Rhoads, 216 Va. 645, 650 (1976).

medical practice, or to third-party payment frauds under such programs as Medicare and Medicaid, and in no case have involved a direct challenge to a physician's diagnosis or treatment.

Furthermore, there also is no prior case in which a physician has been convicted of any federal crime whatsoever based upon conduct within the professional practice of medicine, with the possible exception of the Prohibition statutes enacted under the special authority of the Eighteenth Amendment.[24] Aside from that exception, no federal statute has ever been held to embrace a Congressional intent to regulate the practice of medicine as such. To the contrary, both this Court and other federal courts consistently have interpreted federal statutes to exclude such an intent, even under sweeping statutory language.

The issue has arisen under federal statutes regulating narcotics and prescription drugs. Under the former Harrison Act regulating narcotics, this Court, stating that "direct control of medical practice in the States is beyond the power of the Federal Government," *Linder v. United States*, 268 U.S. 5, 18 (1925), reversed the conviction of a physician for prescribing drugs to an "addict," on the grounds that the indictment was defective for failing to show that the physician "dispensed the drugs otherwise than in the course of his professional practice or for other than medical purposes," *id.* at 17. The same issue was presented under more recent federal narcotics legislation in *United States v. Moore*, 423 U.S. 122 (1975), where this Court followed the same approach, upholding a physician's conviction only on the basis of specific jury instructions requiring that the physician's conduct be shown to have "exceeded the bounds of 'professional practice,'" *id.* at 124. Thus, even under statutes specifically drawn to regulate narcotics prescriptions, this Court's decisions require that the physician's conduct first be shown not to constitute the professional practice of medicine at all, under any theory; they do not permit the government to second-guess the physician's medical judgments as a basis for criminal liability.

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[24] Even this exception proves the rule. In Lambert v. Yellowley, 272 U.S. 581 (1926), this Court declined to enjoin the medical restrictions in the National Prohibition Act, on the ground that Congress's power to enforce the Eighteenth Amendment was equivalent to the police power of the states, *see id.* at 596.

Similarly, under the otherwise sweeping regulation of prescription drugs found in the federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321 et seq., there is an established "practice of medicine" exception, articulated by the FDA[25] and recognized in the federal courts,[26] that construes the Act to exclude any intent to limit or regulate in any way the permissible dosage and administration of drugs by a physician in the course of the professional practice of medicine. Under this interpretation, physicians are free to prescribe dosages and uses of drugs in their practice that have not been approved by the FDA, and therefore would constitute "misbranding" or "adulteration" violating the Act outside the context of medical practice. Note that this established rule is exactly the opposite of the theory of prosecution in this case, which is that Dr. Jacobson could be convicted precisely because he prescribed "excessive" dosages of HCG.

As applied in this case, these authorities raise the question whether Congress, having carefully excluded the federal regulation of medical practice from statutes governing narcotics and prescription drugs, nonetheless intended to upset that delicate balance by authorizing open-ended regulation of medical practice through criminal prosecutions under the mail, wire, and travel fraud statutes.

Moreover, if such an application were permissible as a matter of legislative intent, it would raise the constitutional questions whether the statutes, as so applied, were void for vagueness--as failing to give fair notice of the conduct prohibited[27]--or overbreadth--as

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[25] Food and Drug Administration, *Legal Status of Approved Labeling for Prescription Drugs; Prescribing for Uses Unapproved by the Food and Drug Administration--Notice of Proposed Rulemaking*, 37 Fed. Reg. 16,503 (1972).

[26] *See, e.g.*, United States v. Evers, 453 F. Supp. 1141 (M.D. Ala. 1978), *aff'd*, 643 F.2d 1043 (5th Cir. 1981); Chaney v. Heckler, 718 F.2d 1174, 1180 (D.C. Cir. 1983), *rev'd on other grounds*, 470 U.S. 821 (1985); United States v. Algon Chemical Inc, 879 F.2d 1154 (3d Cir. 1989).

[27] *See* United States v. Siegel, 717 F.2d 9, 23-25 (2d Cir. 1983)(Winter, J., dissenting); Bradley, *Foreword: Mail Fraud After McNally and Carpenter: The Essence of Fraud*, 79 J. Crim. L. & Criminology 573, 620-21 (1988); Podger, *Mail Fraud: Opening Letters*, 43 S.C.L. Rev. 223, 236-39, 267-71 (1992).

creating a chilling effect on the exercise of the constitutionally protected rights of both patients and physicians.[28] In a long line of authority extending back to its decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court has recognized procreative privacy as a fundamental right to be protected against governmental encroachments, enforceable by patients or their physicians, *see Griswold*, 381 U.S. at 480-81. In the most recent of those decisions, this Court further recognized that governmental regulation of the information conveyed between physician and patient in the context of procreative decisions also implicates "the physician's First Amendment rights," *Planned Parenthood v. Casey*, - U.S. -, 112 S. Ct. 2791, 2824 (1992). It would indeed be ironic if patients and physicians seeking to create and sustain life were held to have less constitutional privacy than those seeking abortion. But that is the tenor of the court of appeals' decision in this case.

**II. This Court Should Review the Question Whether a Finding of Criminal Scienter May Be Based Upon a Jury's Choice Between Conflicting Expert Opinions as to Matters of Scientific Theory and Appropriate Medical Treatment.**

The second question presented by this Petition is even more fundamental that the first, because it questions the basic competence of the legal process to render judgments of criminal liability by purporting to resolve issues of ultimate scientific "truth." As this Court recognized just last Term, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, - U.S. -, 113 S. Ct. 2786 (1993), science itself does not purport to establish immutable truth, but rather is characterized by a process or method for formulating testable hypotheses about observable phenomena, *see id.* at 2795-97. Thus, no legal process rationally could rest a determination of ultimate "truth" entirely on scientific opinion testimony, especially where scientific opinion is divided. This fundamental rule of logic was recognized long ago by this Court, and it is violated by the decision below.

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[28] *See* United States v. Margiotta, 688 F.2d 108, 139-44 (2d Cir. 1982)(Winter, J. dissenting); Coffee, *The Metastasis of Mail Fraud: The Continuing Story of White Collar Crime*, 21 Am. Crim. L. Rev. 1, 13-17 (1983).

The issue arises here because of the manner in which the government sought to prove Dr. Jacobson's alleged criminal intent by reference to expert opinion testimony attacking Dr. Jacobson's medical and scientific theories. The government apparently reasoned that if it could show Dr. Jacobson's theories to be objectively "unreasonable," then the jury would be permitted to draw the inference that Dr. Jacobson himself did not believe his own theories, and therefore was "defrauding" his patients (on the fraud counts) and "perjuring" himself when he expressed his belief in his theories (on the perjury counts). Of course, this line of argument is fatally flawed in any event--because the government experts' opinions are completely incompetent to show Dr. Jacobson's state of mind.[29] But entirely aside from that point, the government's theory is foreclosed as a matter of law by this Court's prior decision in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), which construed the mail fraud statute to exclude such theories.

In *Magnetic Healing*, this Court construed the civil branch of the same statute now codified in part as 18 U.S.C. § 1341, and therefore the case is directly applicable here.[30] It involved the Postmaster General's administrative authority to enter a "fraud order" interdicting the delivery of mail. The Postmaster had determined that the School was engaged in a fraud by promoting a course of instruction in "thought healing," *see* 187 U.S. at 103.

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[29] *See* Fed. R. Evid. 704(b). In any event, none of these physicians were given an opinion as to actual state of mind, and never purported to have first-hand knowledge of anything that Dr. Jacobson did or thought.

[30] The statutes involved in *Magnetic Healing* were §§ 3929 and 4041 of the Revised Statutes of 1873, which had been enacted as § 300 of the Act of June 8, 1872, ch. 335, 17 Stat. 322-23. The following section of that same Act, § 301, was the original source for 18 U.S.C. § 1341. *See* McNally v. United States, 483 U.S. 350, 357 & n.5 (1987); Rakoff, *The Federal Mail Fraud Statute*, 18 Duquense L. Rev. 771 (1980). In 1909, the predecessor of § 1341 was amended to codify this Court's holding in Durland v. United States, 161 U.S. 306 (1896), by adding the language "or for obtaining money of property by means of false or fraudulent pretenses, representations, or promises," Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130, thereby making the criminal prohibition coterminous in language with the fraud order provisions construed in *Magnetic Healing*.

This Court set aside the fraud order as a matter of law, on the ground that the statutes "were not intended to cover any case of what the Postmaster General may think to be false opinions, but only in cases of actual fraud in fact, in regard to which opinion formed no basis." 187 U.S. at 106.

The continuing authority of *Magnetic Healing* again was considered by this Court in *Reilly v. Pincus*, 338 U.S. 269 (1949), which reaffirmed *Magnetic Healing* as "a wholesome limitation upon findings of fraud under the mail statutes when the charges concern medical practices in fields where knowledge has not yet crystallized in the crucible of experience," because "[i]n the science of medicine, as in other sciences, experimentation is the spur of progress." 338 U.S. at 274. Although the Court in *Reilly* set aside the fraud order in that case--involving the efficacy of kelp as a weight-reducing aid--it left open the question whether a fraud order could have been entered by resolving a "slight" conflict in medical opinion, *see id.* at 274, or required "universality of scientific belief" against the claims made, *see id.* at 276.

Of course, *Magnetic Healing* and *Reilly* were both civil cases. But they construed the same statute at issue here, and their doubts about the omniscience of legal fact-finding apply a fortiori to a criminal prosecution, especially a criminal prosecution attacking a physician's medical judgment, as contrasted with the commercial promotions involved in those cases. As the decision below in this case refused to recognize *any* limitation on the fact-finder's competence to resolve differences of scientific opinion, that decision is in direct conflict with this Court's prior decisions in *Magnetic Healing* and *Reilly*, which justifies review in this Court.

Furthermore, the questions left open in *Reilly*, and the importance of the legal and scientific context of this case, also justify review on this question. There is no doubt that there was more than merely a "slight" difference of expert opinion displayed at trial, with world-famous experts testifying for the defense with advance information on the support for Dr. Jacobson's theories now appearing in scientific literature around the world. Due to the media sensationalism surrounding this case, which continues even now, the world scientific community is watching what happens here.

This Court now has an opportunity to make a statement about the

use of the federal fraud statutes to mount a civil-style "battle of experts" to litigate scientific issues in a criminal trial. The implements of decision are at hand. This Court's prior decisions in *Magnetic Healing* and *Reilly* provide the framework. The Court's recent decision in *Daubert* provides an appropriate basis for establishing a level of scientific difference of opinion that would foreclose a criminal prosecution on these grounds, and thereby avoid a chilling effect on scientific inquiry.

**III. This Court Should Resolve the Conflict Among Circuits on the Propriety of Jury Instructions Defining Reasonable Doubt.**

One of the cornerstones of American criminal procedure is the requirement that guilt be proved beyond a reasonable doubt, which this Court has held to required by the Due Process Clause, *In re Winship*, 397 U.S. 358 (1970). And yet, there is now a continuing conflict among the circuits on the question whether a criminal defendant has the right to an instruction defining reasonable doubt for the jury, which was denied to the defendant in this case. This Court should grant review to resolve the conflict of authority on this important question.

In refusing Dr. Jacobson's request for an instruction defining reasonable doubt, the district court here was following an established line of Fourth Circuit authority admonishing "district courts not to attempt to define reasonable doubt in their instructions to the jury," *United States v. Headspeth*, 852 F.2d 753, 755 (4th Cir. 1988). The Seventh Circuit is even more hostile to the idea, holding that reasonable doubt should never be defined, even when the jury requests such an instruction.[31] None of the other circuits follows this type of per se rule against a definition.

Instead, the other circuits are arrayed across a continuum of views on when and how reasonable doubt should be defined. The First Circuit permits a definition, and recognizes that defendant is entitled to an instruction that "adequately apprises" the jury of the reasonable doubt standard.[32] The Ninth Circuit follows a similar

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[31] United States v. Blackburn, 992 F.2d 666, 668 (7th Cir. 1993).

[32] United States v. Campbell, 874 F.2d 838, 842 (1st Cir. 1989).

view,[33] although it has a local pattern instruction.[34] The Second Circuit instructs its district courts to give a standard definition that it has approved.[35] The Fifth, Sixth, Eighth, and Eleventh circuits all have local pattern instructions that are approved by their courts of appeals.[36]

This conflict among the circuits is well developed and widely recognized,[37] and can be resolved only by this Court.

**IV. This Court Should Review the Constitutional Propriety of Anonymous Testimony by Disguised Adult Witnesses.**

The extraordinary nature of the theory of prosecution here is matched by the wholly extraordinary procedures adopted at trial, where the district court permitted accusing witnesses to appear in disguise and under obviously fictitious names, to support the already-sensationalized "donor substitution" charges that Dr. Jacobson was the biological father of the witnesses' children. This Court should review the question whether these procedures are consistent with the defendant's rights under the Fifth and Sixth Amendments to a fair trial, a public trial, and confrontation of his accusers.

This Court recently has emphasized that the core requirement of the Sixth Amendment right of confrontation is "a face-to-face meeting with witnesses appearing before the trier of fact," *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). In this case, Dr. Jacobson's accusers were permitted to hide their faces, and their identity, from

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[33] United States v. Nolasco, 926 F.2d 869 (9th Cir. 1991).

[34] *Manual of Model Criminal Jury Instructions for the Ninth Circuit* § 3.03 (1992).

[35] United States v. Delibac, 925 F.2d 610 (2d Cir. 1991).

[36] United States v. Shaw, 894 F.2d 689 (5th Cir. 1990); United States v. Alonzo, 681 F.2d 997 (5th Cir. 1982); United States v. Kirby, 838 F.2d 189 (6th Cir. 1988); United States v. Conley, 523 F.2d 650 (8th Cir. 1975); United States v. Dilg, 700 F.2d 620 (11th Cir. 1983).

[37] *See* Federal Judicial Center, *Pattern Criminal Jury Instructions* 28-29 (1988); 1 Devitt, Blackmar, Wolff & O'Malley, *Federal Jury Practice and Instructions* § 12.10 (4th ed. 1992).

the trier of fact and from public scrutiny, thereby invading the core protections of both the Confrontation Clause and the Public Trial Clause, which similarly proceeds from the view public testimony "encourages witnesses to come forward and discourages perjury," *Waller v. Georgia*, 467 U.S. 39, 46 (1984); *see also In re Oliver*, 333 U.S. 257, 270 (1948). At the heart of both of these constitutional protections is the recognition that it is always easier to accuse anonymously; that is precisely why the constitutional protections exist.

Furthermore, in this case the invasion of the Sixth Amendment protections was permitted under procedures and circumstances that only enhanced the prejudicial effect to Dr. Jacobson, and thereby impaired his right to a fair trial under the Due Process Clause of the Fifth Amendment. By permitting the anonymous testimony, and then underscoring its existence by requiring the placards bearing the assumed names, the district court gave official sanction in the jury's mind to the perception that mere biological relationship to this criminal defendant was so stigmatizing that it had to be hidden.[38]

We are unaware of any case in which accusatory testimony has been permitted under anything approaching the circumstances of this case. This Court's recent decisions in *Coy* and in *Maryland v. Craig*, 497 U.S. 836 (1990), both address the application of the Confrontation Clause to in-court testimony by child witnesses. In this case, the children were neither witnesses nor were they victims, unless the children were deemed to be victims of "wrongful life."

Moreover, the entire issue was created by the government itself, which went to great lengths to overcome the anonymity that the patients had requested and Dr. Jacobson had protected. There was an obvious alternative to infringing upon Dr. Jacobson's constitutional rights--simply dropping 4 "donor substitution" counts, and trying the remaining 48 counts--which would not have harmed the government's "interest" in obtaining a conviction, even if such an interest could be weighed against the constitutional right, *see*

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[38] Indeed, this was essentially the district court's rationale for permitting the anonymous testimony: that the witnesses' children--who were not witnesses--had to be protected from the "psychological harm" (21a) that might result if they learned of their possible relationship to the defendant.

*Maryland v. Craig*, 497 U.S. at 860, 867-70 (Scalia, J., dissenting). Thus, the additional question presented here is whether the defendant's constitutional rights could be abridged by the government's unilateral actions in initially invading the patients' rights to procreative privacy.

This case is appropriate for review in this Court because it presents a dilution of the constitutional rights to confrontation, public trial, and fair trial that is somewhat worse that the abuses envisioned by the dissenters in *Maryland v. Craig*, as it does not involve a child witness at all. The court of appeals was wholly insensitive to the issue (*see* 11a & n.6), and therefore the district court's reported opinion now stands as the only law on the subject, and it implies that there is no constitutional restriction on anonymous accusation by disguised witnesses.

**V. This Court Should Resolve Emerging Conflicts Among the Circuits Regarding the Appropriate Standards for Upward Departures from the Federal Sentencing Guidelines.**

In this case, Dr. Jacobson's sentence to five years' imprisonment reflects a significant upward departure from the sentencing guidelines, based upon findings that were not supported by admissible evidence and reflecting an extent of departure that was not justified by analogy to any portion of the sentencing guidelines. The court of appeals affirmed the sentence essentially on the view that both the grounds for an upward departure and its permissible extent were matters committed to the discretion of the district court. This Court should review that decision, because the court of appeals' analysis conflicts with decisions in other circuits, and because particularizing the standards governing upward departures is centrally important to the realization of the determinate sentencing system envisioned by the Sentencing Reform Act of 1984.

The court of appeals' decision here reflects the problem in two ways:

First, the court of appeals's affirmance of the district court's upward departure for "extreme psychological injury" under U.S.S.G. §5K2.3, based upon assertions contained in letters from former patients, conflicts with the Third Circuit's decision in *United States v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990). *Kikumura* held

that in cases of significant upward departure--unlike ordinary sentencing decisions--"factual findings must be supported by clear and convincing evidence, and hearsay statements may not be considered unless their reliability is established by other evidence," *id.* at 1103.[39] As in *Kikumura*, the court here made its key departure finding on the basis of unverified hearsay.

Second, and more fundamentally, the court of appeals' decision here deepens an ongoing division of authority among the circuits on how the statutory "reasonableness" criterion of 18 U.S.C. § 3742(e) will be applied to limit the extent of upward departures. With the decision here, the Fourth Circuit has joined with the First and Sixth Circuits in applying an unstructured and highly deferential standard,[40] while the Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh circuits follow a stricter "analogical" approach requiring that the extent of an upward departure be justify by analogy to other provisions of the sentencing guidelines.[41] The choice between those two approaches is important to the viability of

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[39] The court in *Kikumura* itself recognized "overwhelming authority in our sister circuits" for the preponderance standard generally, *id.* at 1101, but distinguished the situation of a significant upward departure. The subsequent history of *Kikumura* is mixed: it appears to be followed in the Seventh Circuit, United States v. Trujilo, 948 F.2d 313 (7th Cir. 1991), rejected or at least limited in the Ninth Circuit, United States v. Sanchez, 967 F.2d 1383 (9th Cir. 1992), and questioned in the D.C. Circuit, United States v. Lam, 966 F.2d 682 (D.C. Cir. 1992).

[40] United States v. Diaz-Villafane, 874 F.2d 43 (1st Cir. 1989); United States v. Benskin, 926 F.2d 562 (6th Cir. 1991). Prior to the decision in this case, the Fourth Circuit had professed adherence to the analogical approach in United States v. Hummer, 916 F.2d 186, 194 & n.7 (4th Cir. 1990), but had begun to back away from that position in United States v. Glick, 946 F.2d 335, 339 (4th Cir. 1991), which read *Hummer* as permitting an unstructured "abuse of discretion" standard. With the decision below here, which was not modified on rehearing when the intra-circuit conflict was called to the court's attention, the transformation is complete.

[41] United States v. Kim, 896 F.2d 678, 684-85 (2d Cir. 1990); United States v. Kikumura, 918 F.2d 1084, 1111 (3d Cir. 1990); United States v. Landry, 903 F.2d 334, 340-41 (5th Cir. 1990); United States v. Ferra, 900 F.2d 1057 (7th Cir. 1990); United States v. Pearson, 900 F.2d 1357, 1362 (9th Cir. 1990); United States v. Strickland, 941 F.2d 1047 (10th Cir. 1991); United States v. Schuman, 902 F.2d 873 (11th Cir. 1990).

determinate sentencing, for an overly deferential approach would restore the prior regime of virtually unlimited sentencing discretion. Accordingly, the question warrants review by this Court.

**VI. This Court Should Resolve the Circuit Conflict on the Constitutionality of Dual Guidelines and Pre-Guidelines Sentences Based Upon the Same Conduct.**

The decision below conflicts with the Ninth Circuit's decision in *United States v. Niven*, 952 F.2d 289 (9th Cir. 1991), which held that dual sentencing for the same relevant conduct under both guidelines and pre-guidelines law violates the Double Jeopardy Clause.

The issue arises from the guidelines' definition of "relevant conduct" in a fraud case to require the consideration of all conduct that was part of the same course of conduct or "common scheme or plan," U.S.S.G. § 1B1.3(a)(2). As a result, in this case all of the offense conduct--including all of the conduct underlying 35 of the 46 fraud counts that were *not* subject to guideline sentencing--was considered in determining the guideline sentence, and thereby produced both a higher guideline sentence and a duplicate pre-guideline sentence for the 35 pre-guideline counts. This was the precisely the situation held by the Ninth Circuit in *Niven* to create double jeopardy.

The fact that all of the sentences are concurrent does not render the error harmless, given that the effect of considering offense conduct completed prior to the guidelines raises the guideline sentence and therefore the actual time served.[42] For this reason, the sentence imposed also violates the Ex Post Facto clause under the standards of this Court's decision in *Miller v. Florida*, 482 U.S. 423 (1987).

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[42] According to the presentence report, application of the parole guidelines to Dr. Jacobson would have produced a time served in the range of 12-18 months (JA3313), whereas the guideline range, before considering the upward departure, was 33-41 months (JA3312). Therefore, excluding the 35 pre-guidelines counts from the guidelines' computation of "loss" and other sentencing factors relevant under U.S.S.G. § 1F1.1 necessarily would have reduced the guideline sentence.

**VII. This Court Should Review the Courts of Appeals' Practice of Issuing Unpublished and Unresponsive Decisions.**

The court of appeals' decision in this case is an aggravated example of the growing tendency among the circuits to designate large percentages of their decisions as "unpublished," with a predictable decline in the quality and responsiveness of appellate justice. Here, the practice resulted in an opinion that fails to address most of the main points raised and briefed extensively on appeal--with the court's permission (12a-13a)--including several questions of first impression having wide legal and social impact.

Heretofore, the circuits have been left to their own devices, resulting in non-uniform rules that have been criticized by commentators in both concept and application.[43] Accordingly, this Court should consider whether the courts of appeals require supervision in formulating uniform standards for appellate disposition of cases, especially federal criminal appeals.

**Conclusion**

For the reasons stated above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

February 7, 1994

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(703) 993-8055

*Counsel for Petitioner*
*Cecil B. Jacobson, Jr., M.D.*

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[43] *See, e.g.*, Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573 (1981); Reynolds & Richman, *The Non-Precedential Precedent--Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Col. L. Rev. 1167 (1978); Note, *Unreported Decisions in the United States Courts of Appeals*, 63 Corn. L. Rev. 128 (1977).

# APPENDIX

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

**1. Court of Appeals' Decision on the Merits:**

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v. No. 92-5406

CECIL B. JACOBSON, JR., M.D.,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
James C. Cacheris, Chief District Judge.
(CR-91-474-A)

Argued: February 2, 1993

Decided: September 3, 1993

Before ERVIN, Chief Judge, and PHILLIPS and WILLIAMS,
Circuit Judges.

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Affirmed by unpublished per curiam opinion.

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COUNSEL: Argued: James Roscoe Tate, TATE & BYWATER, LTD., Vienna, Virginia; Jeffrey S. Parker, Arlington, Virginia, for Appellant.
Randy I. Bellows, Assistant United States Attorney, OFFICE OF

THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

On Brief: Richard Cullen, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia; Charles P. Rosenberg, Trial Attorney, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

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Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

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OPINION

PER CURIAM:

Following trial by jury, Cecil B. Jacobson, Jr., M.D., was convicted of fifty-two counts of fraud and perjury stemming from a scheme to cozen patients at his fertility clinic. His direct appeal presents numerous claims in which we find no merit. Accordingly, his convictions and sentence are affirmed.

I

From 1976 to 1988, Dr. Cecil B. Jacobson, Jr. operated Reproductive Genetics, Inc., in Vienna, Virginia. Although Jacobson had no advanced training in infertility medicine, and did not possess professional qualifications that would have enabled him, under generally accepted medical standards, to hold himself out as an infertility specialist, much of his practice involved the treatment of barren women for infertility. His medical schooling, internship, and residency training qualified Jacobson to practice solely as an obstetrician.

Jacobson's infertility treatments involved injections of Human Chorionic Gonadatropin ("HCG"), a hormone derived from the

urine of pregnant women, as a means of stimulating ovulation in infertile women. Although HCG is legitimately used in the treatment of infertility, the Government's proof tended to show that Jacobson overexposed his patients to the hormone, sometimes injecting it continuously up to three times per week for a year or more. Following repeated injections of HCG in massive dosages, many of Jacobson's patients experienced symptoms associated with pregnancy: delayed menstrual periods, bloating, breast tenderness, and nausea. According to testimony presented by the Government's witnesses at trial, the patients, for whom pregnancy had been deeply desired and yet seemingly unattainable, became convinced that Jacobson had worked wonders for them through his HCG treatments. In fact, Jacobson never informed these women that their symptoms were the natural consequence of the HCG injections, not proof of pregnancy. His regular use of HCG, coupled with the high volume of patient appointments his treatments required, reaped substantial profits for Jacobson.

In addition to the HCG injections themselves, Jacobson examined his patients for pregnancy with laboratory tests designed to locate the presence of HCG. The result was repeated false pregnancies for many patients: while under Jacobson's care, the Government's trial witnesses alone experienced over fifty false pregnancies. An additional six patients accounted for some thirty such pregnancies.

The Government's witnesses further established that Jacobson perpetuated the myth that his patients were pregnant sometimes as late as twenty to twenty-three weeks into the course of a normal pregnancy. He accomplished this feat by the use of false sonograms. Although nothing inside the patient's womb could mimic the presence of a real fetus, Jacobson informed the women that certain images on the sonogram screen irrelevant to the presence of a fetus were in fact the products of conception. According to the Government's witnesses, Jacobson repeatedly told his patients that he observed the limbs of nonexistent fetuses, and that he saw the fetuses sucking their thumbs. What Jacobson in fact represented to his patients were often nearby organs or simply fecal matter.

The final element of Jacobson's fraud came into play when he was forced to reveal the true facts to women who thought they were pregnant. This he accomplished by telling his patients that their babies were dead, and by advising those who questioned him about the need for having their uteruses scraped to remove the products of conception (a "D & C"[1] treatment) not to do so. Jacobson discouraged the D & C procedure by informing the women that it could lead to a piercing of the uterus or even a hysterectomy. He also told his patients that the D & C treatment was unnecessary, because the dead fetus would simply "resorb" back into the putative mother's body. Following such "resorptions," women now convinced of Jacobson's ability to help them conceive were led to believe that they were ready for a new pregnancy, and should begin immediately on a fresh cycle of HCG injections and pregnancy tests.

On November 21, 1991 a grand jury in the Eastern District of Virginia returned a fifty-three count indictment against Jacobson. The indictment charged (1) thirty-three counts of mail fraud, 18 U.S.C. § 1341; (2) ten counts of wire fraud, 18 U.S.C. § 1343; (3) four counts of travel fraud, 18 U.S.C. § 2314; (4) one count of general perjury, 18 U.S.C. § 1621; and (5) five counts of perjury before a grand jury or court, 18 U.S.C. § 1623. Following a twelve-day trial, the jury returned verdicts of guilty on all fifty-two remaining[2] counts of the indictment. On May 8, 1992, the district court sentenced Jacobson to a term of sixty months' imprisonment, and ordered him to pay (1) a fine in the amount of $ 75,000.00; (2) restitution to certain of his victims in the amount of $ 39,205.00; and (3) a special assessment in the amount of $ 2,600.00.

This appeal followed.

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[1] The acronym "D & C" represents the phrase "dilation and curettage," a surgical procedure wherein the lining of the uterus is scraped. The procedure is frequently used to remove the products of a failed pregnancy.

[2] Count 20 of the indictment, one of the mail fraud counts, was dismissed upon Government motion prior to trial.

## II

Jacobson's principal argument on appeal is that the federal criminal fraud statutes, 18 U.S.C. §§ 1341,[3] 1343,[4] and 2314,[5]

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[3] Section 1341 of Title 18, titled "Frauds and Swindles," reads in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $ 1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341.

[4] Section 1343 of Title 18, titled "Fraud by wire, radio, or television," states in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $ 1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1343.

[5] Section 2314 of Title 18, titled "Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting," reads in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud,

cannot be construed as criminalizing his conduct. Jacobson challenges his prosecution under these statutes on the premise that use of the mails, wires, and interstate travel was not an integral part of his medical practice.

For the reasons that follow, we reject this premise, and hold that Jacobson's conduct was properly cognizable as fraud under the relevant statutory authorities.

The factual predicates for the mail fraud counts of the indictment were (1) Jacobson's repeated attempts to help his patients obtain health-insurance reimbursements for the costs of his infertility treatments, which involved mailing correspondence to certain insurance companies; (2) Jacobson's encouragement that his patients file health insurance claims for services he knew were fraudulent; (3) Jacobson's use of the mails to reassure his patients that his medical practices were appropriate and scientifically accepted; (4) Jacobson's attempt to encourage new patients to undergo infertility treatment with him by asking former patients to send him, by mail, photographs of their newborn infants, which then would be used as advertising material; (5) Jacobson's use of the mails to obtain and pay for supplies necessary to his fraudulent scheme, such as pregnancy tests and HCG; and (6) Jacobson's use of the mails to send and to receive bills from patients, and to advertise his medical practice.

Jacobson suggests that Kann v. United States, 323 U.S. 88 (1944), restricts the application of 18 U.S.C. § 1341 to mailings that are in some respect central to a fraudulent scheme. He relies

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or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $ 5,000 or more . . .shall be fined not more than $ 10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 2314.

upon the following sentence in Kann:

> The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.

323 U.S. at 95. While this sentence makes clear that the application of section 1341 is in some respects "limited," it does not define explicitly what it means for a given use of the mails to be "part of the execution of the fraud." Id. The question for decision, therefore, is whether any use of the mails is a sufficient predicate for criminal liability under section 1341, or whether the use must be more substantial.

The Supreme Court answered this question definitively nearly four decades ago. To be part of the execution of a fraud, the use of the mails need not be an essential element of the fraudulent scheme. Pereira v. United States, 347 U.S. 1, 8 (1954). It is sufficient for the mailing to be "incident to an essential part of the scheme," id., or "a step in [the] plot," Badders v. United States, 240 U.S. 391, 394 (1916). Moreover, the Supreme Court recently rejected Jacobson's argument that mail fraud can be predicated only upon a mailing which affirmatively assists the perpetrator in carrying out his fraudulent scheme. In Schmuck v. United States, 489 U.S. 705 (1989), the Court spurned a claim that, to invoke 18 U.S.C. § 1314, the mailing element of the fraudulent offense cannot be satisfied by a mailing that is routine and innocent in and of itself, or that is merely tangentially related to the fraud. Id. at 711. Reaffirming Pereira, the Court held that to invoke section 1314, a mailing need not be an essential part of the scheme to defraud, but is sufficient so long as it is "incident to" an essential part of the scheme. Id. at 712.

Under the Supreme Court's clear holdings in Pereira and Schmuck, Jacobson's use of the mails was, without question, a sufficient predicate for the Government's invocation of 18 U.S.C.§

1314. The mailings charged by the indictment were incident to essential elements of Jacobson's fraud: inducing, treating, and billing credulous patients who believed they needed his services. We therefore conclude that the mail fraud counts of the indictment were properly grounded in section 1314.

The factual predicates for the wire fraud counts of the indictment were telephone calls made by patients for the purpose of scheduling appointments with Jacobson. We have recognized that "the wire fraud statute, patterned on the mail fraud act, was meant to receive [a] like interpretation." United States v. Computer Sciences Corp., 689 F.2d 1181, 1188 n.14 (4th Cir. 1982) (citations omitted), cert. denied, 459 U.S. 1105 (1983). We agree with the Third Circuit Court of Appeals that cases construing the mail fraud statute are "applicable to the wire fraud statute as well." United States v. Giovengo, 637 F.2d 941, 944 (3d Cir. 1980), cert. denied sub nom. Paladino v. United States, 450 U.S. 1032 (1981). The question before us, then, is whether the uses of telephone wires alleged in the indictment were "incident to an essential part of the [fraudulent] scheme." Pereira, 347 U.S. at 8. Because the telephone calls cited in the indictment were incident to Jacobson's ability to schedule patient appointments at which his fraudulent treatments could be administered, we conclude that they constitute a proper predicate for the wire fraud counts of the indictment.

In the indictment's travel fraud counts, the Government alleged that Jacobson unlawfully induced certain of his patients to travel in interstate commerce (from the District of Columbia, Maryland, and West Virginia) to his consulting rooms in Vienna, Virginia for the purpose of undergoing infertility treatments. 18 U.S.C. § 2314 provides in relevant part that

> whoever, having devised . . . any scheme or artifice to defraud, . . . induces any person or persons to travel in . . . interstate . . . commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $ 5,000 or more . . .

> shall be fined not more than $ 10,000 or imprisoned not more than ten years, or both.

We observe that the plain language of 18 U.S.C.§ 2314 criminalizes "inducements" to travel in interstate commerce for purposes of receiving fraudulent medical treatments. We therefore conclude that the indictment properly charged Jacobson with inducing his out-of-state patients to travel to Virginia in order to undergo fraudulent medical treatment at his infertility clinic in violation of 18 U.S.C. § 2314.

III

Jacobson's second assignment of error challenges the sentence imposed upon him by the district court. Jacobson contends that the court's decision to depart upward from his established sentence under the United States Sentencing Guidelines was unwarranted and unreasonable. For the reasons that follow, we reject this contention.

Following his conviction, Jacobson faced a maximum sentence of 280 years' imprisonment, including 185 years based on the thirty-five counts of the indictment that predated the effective date of the sentencing guidelines. The district court sentenced Jacobson to sixty months' imprisonment on each of the fifty-two counts, the sentences to run concurrently. The court departed upward from the sentencing range established by the guidelines, imposing a sentence nineteen months longer than that permitted by the upper boundary of the guidelines range.

A district court may depart from the sentencing range established by the sentencing guidelines only if

> the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.

18 U.S.C. § 3553(b). In reviewing upward departures, we must determine whether the sentence was imposed either in violation of law or as a result of an incorrect application of the guidelines. 18 U.S.C. § 3742(f)(1); United States v. Rusher, 966 F.2d 868, 885 (4th Cir.), cert. denied, 113 S. Ct. 351 (1992).

In its written findings with respect to sentencing, the district court supported its decision to depart upward on three bases: (1) U.S.S.G. § 5K2.3 (extreme psychological injury); (2) U.S.S.G. § 5K2.8 (extreme conduct); and (3) U.S.S.G. § 2F1.1 (fraud guidelines failed to capture harmful conduct fully). The court noted that each basis would have been sufficient alone to justify a sixty-month sentence. See United States v. Glick, 946 F.2d 335, 339 (4th Cir. 1991). The court identified the specific factors it believed warranted an upward departure:

> As a physician the defendant gained his patients' trust, the defendant then abused that trust by lying to his patients in order to defraud them of money and property. The court observed many of the defendant's victims when they testified at trial and also read the many victim impact statements submitted to the court. This court has not seen a case the equal of this one in terms of the degree of emotional anguish, psychological trauma and, at times, profound despair expressed by those victims who took the witness stand and/or wrote to the court to communicate their experiences with the defendant. Several of the defendant's patients continue to suffer psychological trauma as a result of their experience with the defendant.

Our review of the record discloses that the district court's findings of extreme conduct, extreme psychological injury, and the guidelines' inability to capture fully the harm of Jacobson's behavior are not clearly erroneous. See United States v. Hummer , 916 F.2d 186, 192 (4th Cir. 1990), cert. denied, 111 S. Ct. 1608 (1991). Having so concluded, we must consider whether the sentencing

court abused its discretion in departing from the established guidelines range on the basis of these factors. Glick, 946 F.2d at 339. As noted above, each of the three categories of departure invoked by the sentencing court are plainly contemplated as proper bases for departure by the sentencing guidelines. After reviewing the testimony of the Government's witnesses, we cannot say that the district court abused its discretion by departing upwards from Jacobson's established guidelines sentencing range to the extent of imposing an additional nineteen months' imprisonment upon him. See Hummer, 916 F.2d at 192. We therefore affirm both the district court's decision to depart upwards and the extent of that departure in sentencing Jacobson.

IV

Our careful review of the record and the arguments of counsel discloses that Jacobson's remaining assignments of error[6] are wholly without merit, and therefore warrant no discussion on our part. Accordingly, we affirm the district court's decisions with respect to them forthwith.

V

For the foregoing reasons, Jacobson's convictions and sentence are hereby

AFFIRMED.

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[6] These assignments of error included contentions (1) that the Government failed to prove a legally sufficient claim against Jacobson; (2) that the district court's instructions to the jury were erroneous and prejudicial; (3) that the Government's investigatory methods were unconstitutional; (4) that the jury was prejudiced by intense media attention; (5) that Jacobson was deprived of his right to confront his accusers publicly; and (6) that the district court improperly excluded important defense evidence and unlawfully admitted prejudicial prosecution evidence.

**2. Court of Appeals' briefing orders:**

**a. Order of October 2, 1992:**

FILED: October 2, 1992
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-5406
(CR-91-474-A)

United States of America,
Plaintiff-Appellee,

v.

Cecil B. Jacobson, Jr., M.D.,
Defendant-Appellant.

ORDER

Appellant has filed a motion for leave to file brief in excess of 50 pages. Although appellant has established good cause for leave to file a brief that exceeds the page limitation specified by Rule 28(g) of the Federal Rules of Appellate Procedure, appellant's requested brief of 95 pages appears excessive.

The Court grants appellant leave to file brief not to exceed 65 pages in length.

For the Court - By Direction

/s/ Bert M. Montague, Clerk

**b. Order of October 21, 1992:**

FILED: October 21, 1992
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-5406
(CR-91-474-A)

United States of America,
Plaintiff-Appellee,

v.

Cecil B. Jacobson, Jr., M.D.,
Defendant-Appellant.

ORDER

The government has filed a motion for extension of time to file brief and a motion for leave to file a brief in excess of 50 pages.

The Court grants the government leave to file a brief not to exceed 65 pages in length on or before November 20, 1992.

For the Court - By Direction

/s/ Bert M. Montague, Clerk

**c. Order of November 18, 1992**

FILED: November 18, 1992
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-5406
(CR-91-474-A)

United States of America,
Plaintiff-Appellee,

v.

Cecil B. Jacobson, Jr., M.D.,
Defendant-Appellant.

ORDER

The government has filed a motion for leave to file a 75-page brief. By order dated October 21, 1992, the Court granted the government leave to file a brief not to exceed 65 pages in length. This Court previously reduced appellant's request for a 95-page brief to 65 pages and the government's brief in response should be equally limited.

The Court denies the government's motion.

For the Court - By Direction

/s/ Bert M. Montague, Clerk

**3. Court of Appeals' Order denying the government's motion to change the transcript of the district court's instructions to the jury on good faith:**

FILED: December 23, 1992

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-5406

United States of America,
Plaintiff-Appellee,

v.

Cecil B. Jacobson, Jr., M.D.,
Defendant-Appellant.

ORDER

The appellee has filed a motion to correct joint appendix volume VII. Appellant has filed an objection to the motion.

The Court denies appellee's motion to correct the joint appendix until the time for oral argument in this case.

For the Court - By Direction

/s/ Bert M. Montague, Clerk

**4. District Court Opinion on courtroom closure and anonymous trial testimony by prosecution witnesses (reported at 785 F. Supp. 563 (E.D. Va. 1992):**

UNITED STATES OF AMERICA, v. CECIL B. JACOBSON, Defendant.

CRIMINAL NO. 91-00474-A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

785 F. Supp. 563; 1992 U.S. Dist. LEXIS 1065; 19 Media L. Rep. 1958

January 9, 1992, Decided

COUNSEL: Randy I. Bellows, Esquire, David G. Barger, Esquire, U.S. Attorney's Office, 1101 King Street, Suite 502, Alexandria, VA 22314, for plaintiff

David R. Axelson, Esquire, James R. Tate, Esquire, TATE & BYWATER, 2740 Chain Bridge Road, Vienna, Virginia 22181, for defendant.

[*566]

MEMORANDUM OPINION

CACHERIS, Chief Judge.

The primary issue before the court is whether or not the courtroom should be closed to the public and the press during the testimony of eleven witnesses in a criminal proceeding. The Government's Motion for Protective Order seeks, inter alia, to close the courtroom during the testimony of eleven witnesses who are the parents of children allegedly fathered by the Defendant when he

allegedly inseminated the female witnesses with his own sperm. For reasons set forth below, the motion is granted in part and denied in part.

I

Background

Dr. Cecil B. Jacobson was indicted on fifty-three counts of mail fraud, wire fraud, travel fraud and perjury. In the indictment, the Government alleges that Dr. Jacobson defrauded certain women and their husbands by representing that the women would be inseminated with sperm from an anonymous donor participating in a donor insemination program. The Government further alleges that, contrary to these representations, Dr. Jacobson inseminated these women with his own sperm, thereby becoming the biological father of the children born to certain of his patients.

In its motion, the Government represents that it intends to call eleven of these parents as witnesses at trial. The Government asks the court to exercise its inherent authority and its purported authority under 18 U.S.C. § 3509 to impose five separate limitations on the pretrial and trial proceedings with respect to these witnesses: (1) to close the courtroom to the public and the press during the witnesses' trial testimony; (2) to allow the witnesses to testify under pseudonyms; (3) to permit the filing under seal of pleadings containing information identifying the witnesses, with redacted copies to be placed in the public record; (4) to subject the parties to certain non-disclosure obligations concerning identifying information which they obtain in the course of the litigation or which they already know; and (5) to redact identifying information from any exhibits or other documents filed with the court.

II

Notice

Before considering a motion for protective order seeking closure

of the courtroom or the sealing of documents in a criminal proceeding, there must be adequate notice to the public that such measures will be considered by the court. In re Washington Post Co., 807 F.2d 383, 390 (4th Cir. 1986) (citation omitted). In particular, closure motions and motions to seal documents must be docketed reasonably in advance of their disposition so as to give the public and the press an opportunity to intervene and present their objections to the court. Id. The Government filed its motion on December 9, 1991 and argument was set for December 20, 1991.[1] The court finds that adequate notice was given in this matter and it may therefore properly consider the Government's Motion for Protective Order.

III

The Court's Authority to Issue the Protective Order

A. 18 U.S.C. § 3509

The Government's first argument for a protective order is based on the special child protection provisions found in 18 U.S.C. § 3509[2] entitled "Child victims' and [*567] child witnesses'

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[1] The Washington Post intervened in this action for the purpose of presenting its objections to the court on December 19, 1991.

[2] Section 3509 provides in pertinent part:

(A) On motion by any person the court may issue an order protecting a child from public disclosure of the name of or any other information concerning the child in the course of the proceedings, if the court determines that there is a significant possibility that such disclosure would be detrimental to the child.

(B) A protective order issued under subparagraph (A) may -

(i) provide that the testimony of a child witness, and the testimony of any other witness, when the attorney who calls the witness has reason to anticipate that the name of or any other information concerning a child may be divulged in the testimony, be taken in a closed courtroom; and

rights." This statute applies only to a "child" as defined by the statute. The definition provides that:

The term "child" means a person who is under the age of 18, who is or is alleged to be - (A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or (B) a witness to a crime committed against another person.

18 U.S.C. § 3509(a)(2) (emphasis added). The Government argues that the children allegedly fathered by Dr. Jacobson should be considered "true witnesses" to the alleged crimes committed against their parents because "it is blood drawn from these children which establish the paternity of the defendant." (Gov't's Motion at 8.) Relying on several definitions of "witness" that do not limit the meaning to one who testifies at trial, the Government argues that although the children will not be testifying at trial, they bear "witness" to a crime committed against their parents.

The court finds, however, that 18 U.S.C. § 3509 does not apply in this situation. The statute offers a series of procedural protections to children who must testify in court, including alternatives to live testimony such as closed circuit television. See, e.g., 18 U.S.C. § 3509(b), (c), (e) & (1). These provisions provide support for the argument that the primary purpose of this statute is to protect children who must testify in court. In addition, the accepted definition of the term "witness" as used in legal proceedings is one who is called to testify before a court. Without further guidance from the legislature or the case law, this court declines to apply a strained interpretation of the term "witness" in order to expand the reach of this relatively new statute.

Even if the court were to find that § 3509 applies to this case, application of the statute would not change the court's constitutional

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(ii) provide for any other measures that may be necessary to protect the privacy of the child.

18 U.S.C. § 3509(d)(3).

analysis or its ruling on this motion. The statutory provision upon which the Government principally relies is permissive, not mandatory. See 18 U.S.C. § 3509(d)(3)(A) ("the court may issue an order protecting a child from public disclosure . . . .) (emphasis added). Thus, the determination of any privacy protections would be within the court's sound discretion. The court finds that even if it were to apply the statute to this case, it would apply the same constitutional standards it applies under its inherent authority and would reach the same conclusion regarding the subject protective order.

B. The Court's Inherent Authority under the First Amendment and the Common Law

It is well-settled that the public and the press have a First Amendment right of access to criminal trials. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980); In re Knight Publishing Co., 743 F.2d 231, 233 (4th Cir. 1984). The common law also gives the public and the press the right to attend and observe criminal trials. See United States v. Criden, 648 F.2d 814, 819 (3d Cir. 1981).

The First Amendment and common law right of access is not absolute, however. This right must be balanced against other compelling interests protected by the Constitution. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 509-10, 78 L. Ed. 2d 629, 104 S. Ct. 819 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606, 73 L. Ed. 2d 248, 102 S. Ct. 2613 (1982). Nonetheless, there is a strong presumption in favor of openness.

IV

Analysis

A. Closure of the Courtroom

The presumption of openness may be overcome only by an overriding interest based on a finding that closure is essential

[*568] to preserve higher values and is narrowly tailored to serve that interest. Press-Enterprise Co., 464 U.S. at 510; accord Globe Newspaper Co., 457 U.S. at 607 (closure can be sustained only if it "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest").

The Supreme Court has recognized that the Government has a compelling interest in "safeguarding the physical and psychological well-being of a minor." Globe Newspaper Co., 457 U.S. at 607. After reviewing the briefs and affidavits submitted, the court finds that keeping secret the true identity of the parents and their children is necessitated by the compelling and overriding governmental interest in the psychological health and welfare of the children involved in this matter. Significant psychological harm may result from public disclosure of the true identity of the parents who bore children fathered by the Defendant. If such a parent's true identity were disclosed in open court, it is likely that the child of this parent would learn the truth of his or her paternity. In order to safeguard the psychological well-being of these children, information regarding their paternity should be revealed to them in a careful manner controlled and directed by their parents.

The court finds, however, that closure of the courtroom during testimony of the parents is not narrowly tailored to serve the governmental interest. The Government asserts that there are no reasonable alternatives to closure of the courtroom during the parent's testimony because of the risk of inadvertent disclosure of identifying information concerning a parent or his or her children. The court disagrees and finds that the Government has not met its burden of showing that there are no less intrusive alternatives to complete closure of the courtroom during the parents' testimony.

The Government itself has proposed less drastic methods, such as the use of pseudonyms, to prevent disclosure of the identity of the parents or children. The greater protection arguably afforded by ordering complete closure in addition to the other methods suggested is outweighed by the harm to the First Amendment interests at

issue. The Government will simply have to avoid inadvertent disclosure of any witnesses' identity through careful preparation and questioning. As to the Government's concerns that the parents will be targeted for photography by the press, the Office of the United States Marshal for the Eastern District of Virginia can assist the Government in moving the witnesses in and out of the courthouse without their being observed or photographed. Indeed, the Government conceded this in its response to the opposition briefs filed in this case. (Gov't's Reply at 9) ("The Government believes it can get these witnesses in and out of the courthouse without being observed and without being photographed. . . . The Office of the United States Marshall [sic] can provide valuable assistance in making this possible."). Finally, the chance that one of the parent witnesses will be recognized by someone in the courtroom is simply not a strong or likely enough reason to override the right of access to criminal proceedings.

The court therefore finds that closure of the courtroom during the parent witnesses' testimony is not narrowly tailored to serve the governmental interest and therefore does not withstand constitutional scrutiny. Accordingly, the court denies the Government's request for a protective order requiring the closure of the courtroom during the testimony of the eleven parent witnesses. The court finds that there are less intrusive and more narrowly tailored measures which should be enacted in order to protect the children in this case.

To prevent disclosure of the true identity of the parents and children, the court will issue a protective order which contains protective measures narrowly tailored to serve the governmental interest in preventing psychological harm to the children.

B. The Use of Pseudonyms

Courts have permitted parties to proceed anonymously by use of pseudonyms where, in balancing the constitutional right of openness against a party's privacy interests, it is determined that pseudonyms are necessary to protect a person from [*569] injury or personal embarrassment. United States v. Doe, 655 F.2d 920, 922 n.1 (9th

Cir. 1980). The court finds that referring to the parent witnesses by assigned pseudonyms is necessary to protect the children from harm. The use of pseudonyms is a narrowly tailored measure because it shields the identity of the witnesses from the press and the public only. Significantly, the Defendant and his counsel will know the true identity of the parents. Use of the pseudonyms will not interfere with the defendant's preparation for trial, with his ability to cross-examine witnesses at trial, or with the scope of the examination. In other words, his Sixth Amendment right to confront all witnesses will be preserved. Any suggestion that the court, by the use of pseudonyms, is placing a "seal of disapproval" on Defendant's conduct or implying that such conduct was "heinous," (Def.'s Response to Gov't's Motions at 9), can be cured by an appropriate instruction to the jury.

Accordingly, the court will issue a protective order providing that the eleven parent witnesses will be allowed to testify in open court under assigned pseudonyms.

C. Exclusion of Sketch Artists

To further protect the identity of the parents and their children from disclosure to the public and the press, the protective order will also provide that no sketch artist will be allowed in the courtroom during the testimony of the eleven parent witnesses.

D. Filings Under Seal, Non-Disclosure, and Redactions

In Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-98, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978), the Supreme Court recognized a common law right to inspect and copy judicial records and documents. See also In re Knight Publishing, 743 F.2d at 235. This right is not absolute, however. The trial court has supervisory power over its own records and files and may, in its sound discretion, seal documents if the public's right of access is outweighed by competing interests. Nixon, 435 U.S. at 598-99; In re Knight, 743 F.2d at 235.

The court finds that the governmental interest in protecting the children from psychological harm outweighs the public's right of access to judicial documents that contain identifying information regarding the parents or their children. Balancing the competing interests, the court finds that there are narrowly tailored measures which will adequately protect the governmental interest while preserving the public's common law right of access. First, the court's protective order regarding judicial documents will apply only to documents that contain identifying information regarding the parents or their children. Second, the documents will not be kept completely under seal; a copy from which all identifying information has been redacted shall be placed in the file for access by the public and the press.

Accordingly, the court will issue a protective order with the following provisions concerning judicial documents: (1) all documents filed with the court that contain information identifying patients who bore children as a result of insemination by the Defendant with sperm that was not the husband's, and any identifying information concerning the children shall be filed under seal along with a copy from which the identifying material has been removed. The redacted copy will be placed in the public file; (2) the parties shall redact from exhibits all identifying information concerning patients who bore children as a result of insemination by the Defendant with sperm that was not the husband's, and any identifying information concerning the children. The parties shall provide unredacted copies of the material to each other; (3) the parties shall not disclose to the public or to the press any identifying information received in the course of the litigation or already known to them.

Accordingly, the Government's Motion for Protective Order is denied in part and granted in part.

An appropriate Order shall issue.

James C. Cacheris, United States District Judge
January 9, 1992, Alexandria, Virginia

**5. District Court's Protective Order regarding anonymous testimony by prosecution witnesses (excerpts):**

FILED: December 30, 1991

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

United States of America, )
) Criminal No. 91-00474-A
v. )
)
Cecil B. Jacobson, )
)
Defendant. )

DISCOVERY AND PROTECTIVE ORDER

Upon motion of the United States, the court being advised as to the nature of this case and the applicability of Rule 6(e) of the Federal Rules of Criminal Procedure to certain discoverable materials, and with due recognition as to the privacy considerations in this matter, it is hereby ORDERED as follows:

* * *

4. The Government shall disclose to counsel for the Defendant the true identity of the individuals named in the indictment under pseudonym as well as the names of other individuals who submitted to paternity testing under pseudonym whom the Government expects to call at trial. Such disclosure shall only be made as follows:

a. The disclosure may only be made by the Government to the attorneys of record for the Defendant.

b. The attorneys of record may only disclose these names,

or any other identifying information,[1] to the Defendant and to no other person or entity, and such disclosure may be made to the Defendant only after her has executed the nondisclosure agreement which is Attachment A and such agreement has been filed with the court.

c. The Defendant may not disclose these names, or any other identifying information, to any other person or entity.

d. The attorneys of record for the Defendant or the Government may seek the permission of the court to make further disclosures of these names, or any other information, should it become necessary in connection with this matter. Such disclosures, however, shall not be made without the court's permission.

5. Neither counsel for Defendant, nor the Defendant, nor any individual employed by, retained by, or associated with counsel for the Defendant shall disclose to any other person or entity the true identity, or identifying information, of individuals who gave birth to a child pursuant to the Defendant's donor insemination protocol, or the identity of such children, regardless of the means by which such information came into the possession of such individuals, without the permission of the court.

6. The Clerk shall forward copies of this Order to all counsel of record.

December 30, 1991
Alexandria, Virginia

James C. Cacheris,
United States District Judge

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[1] Identifying information is defined as any information from which a reasonable person might deduce an individual's true identity, including but not limited to a parent's or child's true first or last name, address, or any other unusual or distinctive information which could lead a reasonable person to a true identification.

**6. Court of Appeals' Order Denying Rehearing**

FILED: November 8, 1993
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-5406
CR-91-474-A

United States of America,
Plaintiff-Appellee,

v.

Cecil B. Jacobson, Jr., M.D.,
Defendant-Appellant.

---

On Petition for Rehearing with Suggestion for Rehearing in Banc

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Appellant filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

This order is entered at the direction of Chief Judge Ervin, with the concurrence of Judge Phillips and Judge Williams.

For the Court,

/s/ Bert M. Montage, Clerk

**7. Texts of Constitutional, Statutory, and Regulatory Provisions Involved:**

**United States Constitution:**

Article I, §9, cl. [3]. No Bill of Attainder or ex post facto Law shall be passed.

Amendment I:

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**Title 18, United States Code:**

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is addressed, any such matter or thing, shall be fined not more than $ 1,000 or imprisoned not more than five years, or both. . . .

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $ 1,000 or imprisoned not more than five years, or both. . . .

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

* * *

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $5,000 or more; or

* * *

Shall be fined not more than $10,000 or imprisoned not more that

ten years, or both. . . .

§ 3553. Imposition of a sentence

* * *

(b) Application of guidelines in imposing a sentence.-The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different than that described. . . .

§ 3742. Review of a sentence

* * *

(e) Consideration.-Upon review of the record, the court of appeals shall determine whether the sentence-

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside of the applicable guideline range and is unreasonable, having regard for-

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); . . .

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

**United States Sentencing Guidelines:**

§ 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the

guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) Solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) All harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) Any other information specified in the applicable guideline.

* * *

§ 2F1.1. Fraud and Deceit

(a) Base Offense Level: 6.

(b) Specific Offense Characteristics.

(1) If the loss exceeded $2,000, increase the offense level as follows:

| Loss (Apply the Greatest) | Increase in Level |
|---|---|
| (A) $2,000 or less | No increase. |
| (B) More than $2,000 | Add 1. |
| (C) More than $5,000 | Add 2. |
| (D) More than $10,000 | Add 3. |
| (E) More than $20,000 | Add 4. |
| (F) More than $40,000 | Add 5. |
| (G) More than $70,000 | Add 6. |
| (H) More than $120,000 | Add 7. |
| (I) More than $200,000 | Add 8. |
| (J) More than $350,000 | Add 9. |
| (K) More than $500,000 | Add 10. |
| (L) More than $800,000 | Add 11. |
| (M) More than $1,500,000 | Add 12. |
| (N) More than $2,500,000 | Add 13. |
| (O) More than $5,000,000 | Add 14. |
| (P) More than $10,000,000 | Add 15. |
| (Q) More than $20,000,000 | Add 16. |
| (R) More than $40,000,000 | Add 17. |
| (S) More than $80,000,000 | Add 18. |

(2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.

(3) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree or process, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(4) If the offense involved the conscious or reckless risk of serious bodily injury, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

(5) If the offense involved the use of foreign bank accounts or

transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.

(6) If the offense--(A) substantially jeopardized the safety and soundness of a financial institution; or (B) affected a financial institution and the defendant derived more than $ 1,000,000 in gross receipts from the offense, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

Commentary

Application Notes:

* * *

6. Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).

* * *

9. Dollar loss often does not fully capture the harmfulness and seriousness of the conduct. In such instances, an upward departure may be warranted. Examples may include the following:

(a) The primary objective of the fraud was non-monetary;

(b) False statements were made for the purpose of facilitating some other crime;

(c) The offense caused physical or psychological harm;

(d) the offense endangered national security or military readiness;

(e) the offense caused a loss of confidence in an important

institution;

(f) completion of the offense was prevented, or the offense was interrupted before it caused serious harm.

§ 2J1.3. Perjury or Subornation of Perjury

(a) Base Offense Level: 12.

(b) Specific Offense Characteristics.

(1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to suborn perjury, increase by 8 levels.

(2) If the perjury or subornation of perjury resulted in substantial interference with the administration of justice, increase by 3 levels.

(c) Cross Reference

(1) If the offense involved perjury or subornation of perjury in respect to a criminal offense, apply § 2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.

(d) Special Instruction.

(1) In the case of counts of perjury or subornation of perjury arising from testimony given, or to be given, in separate proceedings, do not group the counts together under § 3D1.2 (Groups of Closely-Related Counts).

§ 5K2.3. Extreme Psychological Injury (Policy Statement)

If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense,

the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.

Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

§ 5K2.8. Extreme Conduct (Policy Statement)

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

Supreme Court, U.S.
FILED
APR 11 1994
OFFICE OF THE CLERK

No. 93-1275

# In the Supreme Court of the United States

OCTOBER TERM, 1993

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CECIL B. JACOBSON, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

DREW S. DAYS, III
*Solicitor General*

JO ANN HARRIS
*Assistant Attorney General*

JOSEPH C. WYDERKO
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

## QUESTIONS PRESENTED

1. Whether the mail fraud, wire fraud, and travel fraud statutes apply to a doctor's scheme to defraud his patients of money.

2. Whether the evidence at trial was sufficient to show that petitioner acted with the intent to defraud his patients.

3. Whether the district court erred in refusing to instruct the jury on the meaning of reasonable doubt.

4. Whether petitioner was denied his constitutional rights to a fair trial, a public trial, and confrontation of his accusers because the district court allowed 11 witnesses who were parents of children fathered by petitioner to use assigned pseudonyms when they testified.

5. Whether the district court improperly departed upwards from petitioner's Sentencing Guidelines range.

6. Whether the district court's reliance on the same relevant conduct in imposing concurrent terms of five years' imprisonment for 35 pre-Guidelines counts and 17 Guidelines counts violated the Double Jeopardy Clause.

7. Whether the court of appeals properly affirmed petitioner's convictions in an unpublished opinion that did not specifically address each of his claims of error.

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# In the Supreme Court of the United States

OCTOBER TERM, 1993

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No. 93-1275

CECIL B. JACOBSON, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is unreported, but the judgment is noted at 4 F.3d 987 (Table). The opinion of the district court (Pet. App. 16a-24a) is reported at 785 F. Supp. 563.

### JURISDICTION

The judgment of the court of appeals was entered on September 3, 1993. A petition for rehearing was denied on November 8, 1993. Pet. App. 27a. The petition for a writ of certiorari was filed on February 7, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on 32 counts of mail fraud, in violation of 18 U.S.C. 1341; ten counts of wire fraud, in violation of 18 U.S.C. 1343; four counts of travel fraud, in violation of 18 U.S.C. 2314; one count of perjury, in violation of 18 U.S.C. 1621; and five counts of false declarations, in violation of 18 U.S.C. 1623. He was sentenced to 60 months' imprisonment, to be followed by three years of supervised release, and fined $75,000. Petitioner also was ordered to pay $39,205 in restitution. Pet. App. 4a & n.2.

1. From 1976 to 1988, petitioner, an obstetrician by training, operated Reproductive Genetics, Inc., in Vienna, Virginia. His medical practice consisted primarily of performing amniocentesis on pregnant women and treating other patients for infertility. Although he had no advanced training in infertility medicine, petitioner represented both to his patients and to the public that he was an infertility specialist. Pet. App. 2a; Gov't C.A. Br. 6.

a. Petitioner defrauded numerous infertility patients of money by deceiving them into believing they had become pregnant as a result of his treatment when he knew they were not pregnant. After making false guarantees of success to his patients, petitioner administered regular injections of Human Chorionic Gonadotropin (HCG), a hormone derived from the urine of pregnant women that mimicked the signs of pregnancy. Although HCG has been legitimately used in the treatment of infertility, petitioner's practice was to give his patients repeated injections of large dosages of HCG for up to a year or more. Following the HCG injections, many patients

had delayed menstrual periods, bloating, breast tenderness, nausea, elevated basal body temperatures, and other symptoms associated with pregnancy, and they became convinced that they were pregnant as a result of petitioner's treatment. Petitioner never disclosed to his patients that their symptoms were a natural consequence of the HCG injections, and were not necessarily the result of pregnancy. Petitioner reaped substantial profits from his regular use of HCG and the high volume of patient appointments that his treatment required. Pet. App. 2a-3a; Gov't C.A. Br. 7-9.

After petitioner's patients began to experience the symptoms of pregnancy, petitioner misled them into believing that they were in fact pregnant by using laboratory tests that he knew would test positive for pregnancy due to his HCG treatment. Rather than using blood tests to confirm a patient's pregnancy, petitioner repeatedly administered to his patients qualitative tests that merely revealed the minimum threshold level, rather than the actual level, of HCG in the patient's system in order to create false-positive pregnancy tests. When questioned by his patients, petitioner flatly denied that his HCG treatment could trigger false-positive test results. Since the HCG injections delayed a patient's menstrual period for at most two weeks, petitioner also prescribed progesterone suppositories to patients who began bleeding. When the combination of HCG and progesterone did not prevent menstrual bleeding and cramping for some patients, petitioner performed additional pregnancy tests to reassure the patients that they were pregnant. Pet. App. 3a; Gov't C.A. Br. 9-15.

Petitioner, who was an experienced sonographer, misled many patients into believing that they were pregnant for as many as 20 to 23 weeks by performing weekly sonograms. Although nothing inside a patient's womb

could be mistaken for a fetus during a sonogram, petitioner repeatedly told patients that he saw the arms and legs of their fetuses and that he observed the fetuses sucking their thumbs. Petitioner, who called the fetuses "Junior," also told patients that he was taking measurements of their fetuses and observing their heartbeats. When a patient could not see the fetus on the sonogram screen or ultrasound photograph, petitioner would draw a fetus on the photograph with a magic marker. What petitioner indicated were fetuses often were actually nearby organs or fecal matter. Pet. App. 3a; Gov't C.A. Br. 16-22.

After misleading his patients into believing that their pregnancies were progressing to term, petitioner told his patients that their fetuses had died. When patients asked about the need for a Dilatation and Curettage (D & C) treatment to remove the dead fetus from the uterus, petitioner discouraged the procedure by telling his patients that it could lead to a piercing of the uterus necessitating a hysterectomy. He also told patients that D & C treatments were unnecessary because the dead fetuses would be "resorbed" back into their bodies. Petitioner would then start the patients on a new cycle of HCG injections and pregnancy tests. Pet. App. 4a; Gov't C.A. Br. 22-27.

b. In addition to deceiving patients into believing they were pregnant when they were not, petitioner also ran a donor insemination program in which he fraudulently inseminated and impregnated at least 15 patients with his own sperm. He falsely represented to patients, among other things, that the donor used to inseminate them would never know their identity, would match the physical characteristics of the patient's husband, and would be used to father only two or three other children. As a result, petitioner's patients were induced to pay substan-

tial amounts of money to bear children actually fathered by petitioner. Gov't C.A. Br. 27-31.

c. Petitioner made false statements concerning his infertility treatment in an affidavit filed in response to a civil injunctive action brought by the Federal Trade Commission in 1989. He also made false statements c n-cerning his infertility treatment, his donor insemination program, and his financial affairs in five depositions taken in connection with civil actions filed by his patients. Gov't Opp. to Pet. for Reh'g 5; Presentence Report (PSR) 7-8.

2. Prior to trial, the government sought a protective order to close the courtroom to the public and the press during the testimony of 11 witnesses who were parents of children fathered by petitioner. The district court declined the government's request. Pet. App. 16a-22a. Instead, the court decided to allow the parent witnesses to use assigned pseudonyms when they testified. *Id.* at 22a-23a, 25a-26a. The court found that "[t]he use of pseudonyms is a narrowly tailored measure because it shields the identity of the witnesses from the press and the public only." *Id.* at 23a. The court also concluded that "[u]se of the pseudonyms will not interfere with [petitioner's] preparation for trial, with his ability to cross-examine witnesses at trial, or with the scope of the examination" because "[petitioner] and his counsel will know the true identity of the parents." *Ibid.*

At trial, the 11 parent witnesses called by the government used assigned pseudonyms when they testified, with the pseudonym placed on a placard to remind counsel not to use their true names. In addition, nine of the parent witnesses were allowed slightly to alter their appearance by wearing wigs and makeup. Gov't C.A. Br. 47 n.65. During its jury charge, the court instructed the

jury not to draw any inference of guilt or innocence from the parent witnesses' use of pseudonyms. *Id.* at 49.

3. Because the offenses charged in 35 counts of the indictment were committed before the effective date of the Sentencing Guidelines, petitioner was subject to pre-Guidelines sentences on those counts. The district court sentenced petitioner to concurrent terms of five years' imprisonment on each of those counts. Pet. App. 9a; Gov't C.A. Br. 59.

With respect to the other 17 counts, the presentence report grouped the 11 fraud counts and calculated petitioner's adjusted offense level under Sentencing Guidelines § 2F1.1 on those counts to be 17. That calculation included a five-level adjustment under § 2F1.1(b)(1)(F) for a loss incurred by petitioner's conduct of $85,600. In computing the amount of the loss, the probation officer included as relevant conduct under Guidelines § 1B1.3 the total amount of fees paid by the patients who were named in the indictment or who testified at trial. PSR Worksheet A. After separately determining the adjusted offense levels for the six perjury counts, the presentence report determined that petitioner's combined adjusted offense level was 20. PSR Worksheet B. With a criminal history category of I, petitioner's Guidelines sentencing range was 33-41 months' imprisonment. PSR 19.

Departing upwards, the district court sentenced petitioner to 60 months' imprisonment, to run concurrently with the sentences on the pre-Guidelines counts. Pet. App. 9a-10a. The court justified its upward departure on the grounds that petitioner had inflicted extreme psychological injury on the victims under Guidelines § 5K2.3 (Policy Statement), that the offenses had involved extreme conduct under § 5K2.8 (Policy Statement), and that § 2F1.1 failed to account fully for the harmful conduct. Pet. App. 10a.

4. The court of appeals affirmed. Pet. App. 1a-11a. It rejected petitioner's claim that the use of the mails, wires, and interstate travel was not an integral part of his scheme to defraud his patients. *Id.* at 5a-9a. Relying on *Pereira* v. *United States*, 347 U.S. 1 (1954), and *Schmuck* v. *United States*, 489 U.S. 705 (1989), the court concluded that petitioner's use of the mails "was, without question, a sufficient predicate for the Government's invocation of 18 U.S.C. § 1341" because "[t]he mailings charged by the indictment were incident to essential elements of [petitioner's] fraud: inducing, treating, and billing credulous patients who believed they needed his services." Pet. App. 7a-8a. The court similarly concluded that "[b]ecause the telephone calls cited in the indictment were incident to [petitioner's] ability to schedule patient appointments at which his fraudulent treatments could be administered, * * * they constitute a proper predicate for the wire fraud counts [under 18 U.S.C. 1343]." *Id.* at 8a. The court further found that "the indictment properly charged [petitioner] with inducing his out-of-state patients to travel to Virginia in order to undergo fraudulent medical treatment at his infertility clinic in violation of 18 U.S.C. § 2314." *Id.* at 9a.

The court of appeals also rejected petitioner's claim that the district court improperly departed upwards from the sentencing range on the 17 counts to which the Sentencing Guidelines applied. Pet. App. 9a-11a. The court's "review of the record disclose[d] that the district court's findings of extreme conduct, extreme psychological injury, and the guidelines' inability to capture fully the harm of [petitioner's] behavior are not clearly erroneous." *Id.* at 10a. It also noted that "the three categories of departure invoked by the sentencing court are plainly contemplated as proper bases for departure under the sentencing guidelines." *Id.* at 11a. The court con-

cluded that the district court did not abuse its discretion "by departing upwards from [petitioner's] established guidelines sentencing range to the extent of imposing an additional nineteen months' imprisonment upon him." *Ibid.*

Finally, the court of appeals observed that its "careful review of the record and the arguments of counsel discloses that [petitioner's] remaining assignments of error are wholly without merit, and therefore warrant no discussion on our part." Pet. App. 11a (footnote omitted).

**ARGUMENT**

1. Petitioner first contends (Pet. 16-21) that his prosecution under the mail fraud, wire fraud, and travel fraud statutes constituted improper federal regulation of his medical practice.

Petitioner is not exempt from prosecution under the federal fraud statutes applied in this case on the theory that he was merely engaging in the professional practice of medicine. The evidence showed that petitioner defrauded patients of money by deceiving them into believing that they were pregnant, that their pregnancies were progressing to term, and that their babies had suddenly died and been resorbed back into their bodies. The evidence further showed that petitioner defrauded patients of money by lying to them about the identity of the donor of the sperm in his donor insemination program. Thus, the evidence showed that petitioner engaged in classic schemes to defraud: he repeatedly deceived, and lied to, his patients about their medical treatment in order to obtain their money.

There is likewise no merit in petitioner's contention that the federal fraud statutes were applied in this case so as to create substantive federal standards of professional medical practice. While there was ample expert

testimony at trial that petitioner's infertility treatments far exceeded the bounds of recognized and acceptable medical practice, the allegations of fraud against petitioner are not predicated on his deviation from the standards of acceptable medical practice. Rather, petitioner's fraud convictions are based on the evidence that he knowingly made false representations to his patients concerning the nature and effect of his treatments.[1] Consequently, petitioner's claim does not warrant further review.

2. Petitioner next contends (Pet. 21-24) that the evidence at trial was insufficient as a matter of law to show that he acted with the requisite criminal intent because there was conflicting expert testimony on the appropriateness of his medical treatment. Petitioner relies (Pet. 23) on two cases involving the predecessor civil counterpart to 18 U.S.C. 1341, see *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902), and *Reilly* v. *Pinkus*, 338 U.S. 269 (1949), but those cases do not support his contention. In *McAnnulty*, the Court set aside the Postmaster General's fraud order, which was based on a finding that it was false and fraudulent for the American School of Magnetic Healing to claim that a proper mental state could cure physical ills. 187 U.S. at 103-104. Because there were two widely held schools of opinion concerning whether the mind could affect bodily diseases, the Court concluded that scientific knowledge had not advanced to the point where an intent to deceive

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[1] Neither *Linder* v. *United States*, 268 U.S. 5 (1925), nor *United States* v. *Moore*, 423 U.S. 122 (1975), has anything to do with this case. See Pet. 19. Both involved prosecutions of physicians under the controlled substances statutes and turned on whether those statutes were properly interpreted to cover the specific physician conduct at issue.

could be attributed to a person asserting either opinion. *Id.* at 104. The Court subsequently explained in *Pinkus* that the *McAnnulty* holding did not "prescrib[e] an inexorable rule that automatically bars reliance of the fact-finding tribunal upon informed medical judgment every time medical witnesses can be produced who blindly adhere to a curative technique thoroughly discredited by reliable scientific experiences." 338 U.S. at 274. Rather, the Court in *Pinkus* "accept[ed] the *McAnnulty* decision as a wholesome limitation upon findings of fraud under the mail statutes when the charges concern medical practices in fields where knowledge has not yet been crystallized in the crucible of experience." *Ibid.*

Contrary to petitioner's claim, there was virtually no conflict among the expert witnesses in this case concerning the appropriateness of petitioner's course of treatment for specific patients. Indeed, petitioner's expert witnesses generally agreed with the government's experts that many of petitioner's representations to his patients had been false as a matter of medical fact. The expert witnesses, for example, agreed that, contrary to petitioner's representations to his patients, the sustained administration of HCG injections could cause false-positive pregnancy tests, particularly given the highly sensitive qualitative tests that petitioner used. Gov't C.A. Br. 11-15, 32-36. The experts also generally agreed that, once again contrary to petitioner's representations to his patients, the photographs of the sonograms that petitioner administered to his patients did not show fetuses. *Id.* at 16-22, 32-36. In addition, the experts agreed that there was no evidence that advanced fetuses could resorb back into the mother's body. *Id.* at 24 n.30. Thus, although the expert witnesses may have disagreed over the theoretical validity of petitioner's infertility treatment, they did not differ as to whether

petitioner's representations to his patients during the course of their treatment were false.

3. Petitioner also contends (Pet. 24-25) that the district court erred in failing to define for the jury the concept of "reasonable doubt." That contention does not warrant this Court's review.

Due process requires a trial court to instruct the jury that the government must prove its case beyond a reasonable doubt. See *Jackson* v. *Virginia*, 443 U.S. 307, 320 n.14 (1979); *In re Winship*, 397 U.S. 358 (1970). This Court, however, has never held that the Constitution requires a court to define reasonable doubt for the jury. To the contrary, the Court recently noted in *Victor* v. *Nebraska*, No. 92-8894 (Mar. 22, 1994), slip op. 1, that "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." See also *Holland* v. *United States*, 348 U.S. 121, 140 (1954); *Dunbar* v. *United States*, 156 U.S. 185, 199 (1895); *Hopt* v. *Utah*, 120 U.S. 430, 440-441 (1887); *Miles* v. *United States*, 103 U.S. 304, 312 (1881).

In light of the difficulties in defining reasonable doubt, three circuits take the view that the trial judge should not define reasonable doubt for the jury, since the definition is likely to add little to the jury's understanding of the concept and may in some instances lead to jury confusion. See *United States* v. *Glass*, 846 F.2d 386, 387 (7th Cir. 1988); *United States* v. *Moss*, 756 F.2d 329, 333 (4th Cir. 1985); *Thompson* v. *Lynaugh*, 821 F.2d 1054, 1060-1061 (5th Cir.), cert. denied, 483 U.S. 1035 (1987).[2] Four

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[2] The Fourth and Seventh Circuits disagree as to whether reasonable doubt should be defined if the jury asks the court to do so. Compare *United States* v. *Russell*, 971 F.2d 1098, 1108 (4th Cir. 1992) (court should define if jury is "demonstrably confused or uncertain"), cert. denied, 113 S. Ct. 1013 (1993) with *United States* v.

other circuits have held that it is not error for a district court to refrain from defining reasonable doubt. *United States* v. *Taylor*, 997 F.2d 1551, 1557-1558 (D.C. Cir. 1993); *United States* v. *Nolasco*, 926 F.2d 869, 872 (9th Cir.) (en banc), cert. denied, 112 S. Ct. 111 (1991); *United States* v. *Olmstead*, 832 F.2d 642, 646 (1st Cir. 1987), cert. denied, 486 U.S. 1009 (1988); *Whiteside* v. *Parke*, 705 F.2d 869, 871-873 (6th Cir.), cert. denied, 464 U.S. 843 (1983). Since the district court's refusal in this case to instruct on the meaning of reasonable doubt is consistent with the clear trend of recent authority in the federal courts, and does not conflict with any decision of any other court of appeals, petitioner's claim merits no further review.

4. Petitioner next contends (Pet. 25-27) that he was denied his constitutional rights to a fair trial, a public trial, and confrontation of his accusers when the district court allowed the 11 witnesses who were parents of children fathered by petitioner to use assigned pseudonyms when they testified. Petitioner's principal claim (Pet. 25-26) is that the procedure of allowing the 11 parent witnesses to testify using pseudonyms violated the Confrontation Clause by depriving him of a "face-to-face meeting" with his accusers. See *Maryland* v. *Craig*, 497 U.S. 836, 844 (1990) ("the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact") (quoting *Coy* v. *Iowa*, 487 U.S. 1012, 1016 (1988)). In *Craig*, the Court explained that "[t]he combined effect of [the] elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation

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*Blackburn*, 992 F.2d 666, 668 (7th Cir.) (court should refuse requests for definition), cert. denied, 114 S. Ct. 393 (1993). That issue is not presented in this case.

Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." 497 U.S. at 846. The Court concluded in *Craig* that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850.

In this case, petitioner obviously was not deprived of a "physical, face-to-face confrontation" with the 11 parent witnesses who used assigned pseudonyms. Rather, petitioner confronted those witnesses face-to-face when they testified in open court.[3] Moreover, each of the witnesses testified under oath and was fully cross-examined by petitioner, and the jury was able to observe each witness's demeanor. Thus, there is plainly no merit in petitioner's claim that he was deprived of his Confrontation Clause rights at trial.

Nor is there any merit in petitioner's claim that he was deprived of a public trial. In *Waller* v. *Georgia*, 467 U.S. 39, 45 (1984), the Court made clear that "the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting dis-

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[3] Petitioner suggests (Pet. 25) that he was deprived of a physical, face-to-face confrontation because the witnesses were allowed "to appear in disguise and under obviously fictitious names." The district court, however, merely allowed the witnesses slightly to alter their appearances by wearing wigs and makeup. Gov't C.A. Br. 47 n.65. Moreover, petitioner was advised of the true identity of each witness long before trial in accordance with the terms of the protective order. Pet. App. 23a, 25a-26a. Cf. *Smith* v. *Illinois*, 390 U.S. 129 (1968).

closure of sensitive information." The Court explained that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Ibid.* (quoting *Press-Enterprise Co.* v. *Superior Court of California, Riverside County*, 464 U.S. 501, 510 (1984)). In this case, the district court refused the government's request to close the trial to the public during the testimony of the 11 parent witnesses. Rather, the district court selected the less drastic measure of using pseudonyms for the witnesses. Pet. App. 20a-23a. Although the use of pseudonyms deprived the public of knowledge of the identity of the witnesses, that limitation was justified by a compelling interest in protecting the well-being of children. Based on affidavits from a psychologist and a child psychiatrist, the district court found that "[i]n order to safeguard the psychological well-being of [the] children, information regarding their paternity should be revealed to them in a careful manner controlled and directed by their parents." *Id.* at 21a. The district court thus concluded that "keeping secret the true identity of the parents and their children is necessitated by the compelling and overriding governmental interest in the psychological health and welfare of the children involved in this matter." *Ibid.* Accordingly, petitioner's claim that he was deprived of his Sixth Amendment right to a public trial warrants no further review.[4]

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[4] There is likewise no merit in petitioner's claim (Pet. 26) that the use of pseudonyms for the 11 parent witnesses, along with identifying placards, deprived him of a fair trial by suggesting that the children's biological relationship with petitioner was "stigmatizing." The placards were simply used to remind counsel not to use the witnesses' real names, and petitioner did not object to that procedure at trial. Gov't C.A. Br. 47 n.65. In any event,

5. Petitioner also contends (Pet. 27-28) that the district court improperly departed upwards from his Sentencing Guidelines range because his victims had suffered "extreme psychological injury" under Guidelines § 5K2.3 (Policy Statement) based on unverified hearsay statements from the victims. He further contends (Pet. 28-29) that the district court improperly failed to structure the extent of the upward departure by analogy to other provisions of the Sentencing Guidelines. Neither contention warrants this Court's review.

a. There is no merit in petitioner's claim (Pet. 27-28) that the district court improperly relied on letters from petitioner's former patients in finding that his victims had suffered "extreme psychological injury" under Guidelines § 5K2.3. In *United States* v. *Tucker*, 404 U.S. 443, 446 (1972), this Court explained that a sentencing judge may "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." See also *United States* v. *Grayson*, 438 U.S. 41, 49-50 (1978); *Williams* v. *New York*, 337 U.S. 241, 250-251 (1949). That principle is embraced in the Sentencing Guidelines, which allow a district court to consider any reliable evidence, including hearsay, at sentencing. See Guidelines § 6A1.3 (Policy Statement); see also *United States* v. *Tardiff*, 969 F.2d 1283, 1287 (1st Cir. 1992) (victim impact statements are "the type and kind of evidence on which sentencing courts have commonly relied").

Relying on *United States* v. *Kikumura*, 918 F.2d 1084 (3d Cir. 1990), petitioner claims (Pet. 27-28) that the evidence of psychological injury was insufficient to

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the district court specifically instructed the jury against drawing inferences of guilt or innocence from the witnesses' use of pseudonyms. Gov't C.A. Br. 49.

justify an upward departure from the Guidelines sentencing range, because the departure must be established by clear and convincing evidence. The courts of appeals have generally held, however, that factual findings under the Sentencing Guidelines need not be established by more than a preponderance of the evidence. See, *e.g.*, *United States* v. *Lam Kwong-Wah*, 966 F.2d 682, 685-686 (D.C. Cir.) (collecting cases), cert. denied, 113 S. Ct. 287 (1992); *United States* v. *Restrepo*, 946 F.2d 654, 655-656 (9th Cir. 1991) (en banc) (same), cert. denied, 112 S. Ct. 1564 (1992). Although the court of appeals in *Kikumura* required proof by clear and convincing evidence to support the district court's 22-level upward departure in the defendant's offense level under 18 U.S.C. 3553(b), see 918 F.2d at 1100-1102, the departure in that case resulted in an increase in the defendant's sentence from 30 months' imprisonment to 30 years' imprisonment. *Id.* at 1100. Some courts of appeals have left open the question whether a higher standard of proof may be appropriate in such exceptional cases. See *United States* v. *Mergerson*, 4 F.3d 337, 343-344 (5th Cir. 1993), cert. denied, No. 93-7246 (Mar. 21, 1994); *United States* v. *Concepcion*, 983 F.2d 369, 390 (2d Cir. 1992), cert. denied, 114 S. Ct. 163 (1993); *United States* v. *Lam Kwong-Wah*, 966 F.2d at 687-688; *United States* v. *Restrepo*, 946 F.2d at 661 & n.12; *United States* v. *Townley*, 929 F.2d 365, 369-370 (8th Cir. 1991); *United States* v. *St. Julian*, 922 F.2d 563, 569 n.1 (10th Cir. 1990); see also *Kinder* v. *United States*, 112 S. Ct. 2290, 2291-2292 (1992) (White, J., dissenting from denial of certiorari). We are unaware, however, of any court of appeals that has followed *Kikumura*. See *United States* v. *August*, 984 F.2d 705, 713-714 (6th Cir. 1992) (per curiam), cert. denied, 114 S. Ct. 158 (1993); *United States* v. *Harrison-Philpot*, 978 F.2d 1520, 1524 & n.1 (9th Cir.

1992), cert. denied, 113 S. Ct. 2392 (1993); *United States* v. *Masters*, 978 F.2d 281, 286-287 (7th Cir. 1992), cert. denied, 113 S. Ct. 2333 (1993); *United States* v. *Sanchez*, 967 F.2d 1383, 1386-1387 (9th Cir. 1992). Thus, it is highly unlikely that any court of appeals would find that the district court's 19-month upward departure from the top of petitioner's sentencing range was sufficiently extraordinary to warrant application of a higher standard of proof. See, *e.g.*, *United States* v. *Galloway*, 976 F.2d 414, 425 (8th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1420 (1993).

In any event, as the court of appeals noted, the district court's upward departure in this case was based not only on the letters from petitioner's former patients but also on the testimony of petitioner's victims at trial. Pet. App. 10a. Moreover, the district court based its upward departure not only on the ground that petitioner had inflicted extreme psychological injury on the victims under Guidelines § 5K2.3 but also on two other grounds: that the offenses involved extreme conduct under § 5K2.8 (Policy Statement) and that the fraud guideline, § 2F1.1, failed to account fully for the harmful conduct. Pet. App. 10a. The district court did not err in concluding that a 19-month upward departure was "reasonable" based on these three grounds.

b. There is likewise no merit in petitioner's claim (Pet. 28-29) that the district court improperly failed to structure the extent of the upward departure by analogy to other provisions in the Sentencing Guidelines. As this Court noted in *Williams* v. *United States*, 112 S. Ct. 1112, 1120 (1992), the extent of a district court's departure from the Guidelines range is reviewed for reasonableness under 18 U.S.C. 3742(f)(2). In assessing reasonableness, the Court explained, "a court of appeals [should] examine the factors to be considered in imposing

a sentence under the Guidelines, as well as the district court's stated reasons for the imposition of the particular sentence." 112 S. Ct. at 1121.

Although the Sentencing Guidelines recommend a procedure for departures from the Guidelines sentencing range based on a defendant's criminal history, see Guidelines § 4A1.3 (Policy Statement), they do not recommend any specific procedure for departures under 18 U.S.C. 3553(b) and Guidelines § 5K2.0 (Policy Statement) based on aggravating or mitigating circumstances. See, *e.g.*, *United States* v. *Shoupe*, 988 F.2d 440, 445 n.7 (3d Cir. 1993). In order to determine whether a departure is reasonable under 18 U.S.C. 3742(f)(2), a number of courts of appeals have recommended that district courts structure upward departures—both as to the aggravating circumstances relied upon and the degree of departure—by analogy to other specific offense characteristics that the Guidelines take into account. See, *e.g.*, *United States* v. *Lara*, 975 F.2d 1120, 1126 (5th Cir. 1992); *United States* v. *Melton*, 970 F.2d 1328, 1334 (4th Cir. 1992); *United States* v. *Lira-Barraza*, 941 F.2d 745, 747-751 (9th Cir. 1991) (en banc); *United States* v. *Jackson*, 921 F.2d 985, 990-991 (10th Cir. 1990) (en banc); *United States* v. *Kikumura*, 918 F.2d at 1112-1113; *United States* v. *Ferra*, 900 F.2d 1057, 1062-1063 (7th Cir. 1990); *United States* v. *Kim*, 896 F.2d 678, 683-685 (2d Cir. 1990). The First Circuit appears to be the only court of appeals that has explicitly rejected that approach. See *United States* v. *Emery*, 991 F.2d 907, 913 n.10 (1993). At the same time, most of the courts of appeals have also indicated that district courts need not mechanically justify their departures by analogy in every case so long as the court explains on the record how it determined the magnitude of the departure. See, *e.g.*, *United States* v. *MacDonald*, 992 F.2d 967, 971 (9th

Cir. 1993); *United States* v. *Merritt*, 988 F.2d 1298, 1311 (2d Cir.), cert. denied, 113 S. Ct. 2933 (1993); *United States* v. *Jackson*, 921 F.2d at 991; *United States* v. *Kikumura*, 918 F.2d at 1113; see also *United States* v. *Lee*, 989 F.2d 180, 183-184 (5th Cir. 1993) (per curiam).

To the extent that there is some disagreement among the courts of appeals over whether a district court is required to justify an upward departure based on a defendant's offense-related conduct by analogy to other guidelines, the Commission is available to clarify matters. See *Braxton* v. *United States*, 111 S. Ct. 1854, 1858 (1991). In any event, this case does not present a suitable vehicle to address that issue. Here, the district court's upward departure was based primarily on the effect of petitioner's crimes on the victims. Pet. App. 10a. As the Second Circuit explained in *United States* v. *Pergola*, 930 F.2d 216, 220 (1991), "the requirement of a specific step-by-step calculation and comparison [to other guidelines] is not particularly apt where * * * (a) harm to the victim is at issue, and (b) the type of harm at issue is psychological rather than physical, making observation difficult and quantification nearly impossible." Moreover, this Court noted in *Williams* v. *United States*, *supra*, that "[t]he development of the guideline sentencing regime has not changed our view that, except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" 112 S. Ct. at 1121 (quoting *Solem* v. *Helm*, 463 U.S. 277, 290 n.16 (1983)). Accordingly, further review of petitioner's claim is not warranted.

6. Petitioner also contends (Pet. 29) that the court of appeals' decision affirming the district court's sentence conflicts with *United States* v. *Niven*, 952 F.2d 289 (9th

Cir. 1991) (per curiam). That contention is without merit.

In *Niven*, the district court included losses involved in pre-Guidelines fraud counts as relevant conduct under Guidelines § 1B1.3 in its calculation of the total loss under § 2F1.1 for purposes of determining the defendant's sentencing range on fraud counts to which the Sentencing Guidelines applied. The district court then sentenced the defendant in *Niven* to five years' imprisonment on the pre-Guidelines counts, to run consecutively to a 51-month sentence on the Guidelines counts. 952 F.2d at 293. The Ninth Circuit concluded that the "[i]nclusion of the pre-Guidelines portion of the total loss when determining both the pre-Guidelines and Guidelines sentences potentially violates the Double Jeopardy Clause, which 'protects against multiple punishments for the same offense.'" *Id.* at 293-294 (citation omitted). It therefore remanded for resentencing with directions to the district court "to calculate the Guidelines sentence solely with reference to losses not considered in imposing the pre-Guidelines sentence." *Id.* at 294. The Ninth Circuit further explained: "Alternatively, the [district] court may aggregate the amount of losses in calculating the offense level for the Guidelines sentence, so long as it imposes *concurrent* sentences for the pre-Guidelines and Guidelines offenses." *Ibid.* (emphasis added). See also *United States* v. *Scarano*, 975 F.2d 580, 586 (9th Cir. 1992).

Like the district court in *Niven*, the district court in this case included the losses involved in the pre-Guidelines fraud counts as relevant conduct under Guidelines § 1B1.3 in its calculation of the total loss under § 2F1.1 for purposes of determining petitioner's sentencing range on the fraud counts to which the Sentencing Guidelines applied. Unlike the district court

in *Niven*, however, the district court in this case imposed concurrent sentences on the pre-Guidelines counts and the Guidelines counts. Accordingly, the district court's sentence is fully consistent with the Ninth Circuit's decision in *Niven*.[5]

7. Finally, petitioner criticizes (Pet. 30) the court of appeals for issuing an unpublished opinion that fails to address most of the "main" points he raised on appeal. That criticism supplies no basis for reviewing, much less reversing, the judgment below. The right to appeal provided a defendant under 28 U.S.C. 1291 entitles him to an independent review of the district court's judgment by the court of appeals. Petitioner received precisely that. The right to an appeal does not also encompass the right

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[5] Notwithstanding *Niven*, petitioner suggests (Pet. 29) that inclusion of the pre-Guidelines portion of the total loss in the calculation of the sentence for the Guidelines counts violates the Double Jeopardy Clause, even if concurrent sentences are imposed. That issue, however, is of no continuing importance, as it arises only in a rapidly diminishing number of cases involving simultaneous fraud prosecutions for criminal conduct that both precedes and follows the November 1, 1987, effective date of the Sentencing Guidelines. This Court recently declined to consider a challenge under the Double Jeopardy Clause to the use of the same type of pre-Guidelines conduct in imposing both a Guidelines and a pre-Guidelines sentence, see *Boyenga* v. *United States*, cert. denied, No. 93-6621 (Feb. 28, 1994), and there is no reason for a different disposition in this case.

There is likewise no merit in petitioner's passing suggestion (Pet. 29) that his sentence violated the Ex Post Facto Clause. The application of Guidelines § 1B1.3 to include the pre-Guidelines portion of the total loss in the determination of the Guidelines sentencing range affects petitioner's sentence only on the Guidelines counts; it does not retrospectively increase the punishment for any offense after that offense is committed. See *Collins* v. *Youngblood*, 497 U.S. 37 (1990).

to an opinion treating each of the defendant's claims separately and in detail. "The fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal." *Furman* v. *United States*, 720 F.2d 263, 265 (2d Cir. 1983) (per curiam). See also *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam) (courts of appeals "have wide latitude in their decisions of whether or how to write opinions"); *United States* v. *Baynes*, 548 F.2d 481 (3d Cir. 1977) (per curiam); *N L R B* v. *Amalgamated Clothing Workers*, 430 F.2d 966, 971 (5th Cir. 1970); Fed. R. App. P. 36.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1994

Supreme Court, U.S.
FILED
APR 26 1994
OFFICE OF THE CLERK

No. 93-1275

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

CECIL B. JACOBSON, JR., M.D.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

# REPLY BRIEF FOR PETITIONER

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April 26, 1994

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# REPLY BRIEF FOR PETITIONER

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The Government's brief in opposition explicitly concedes that there are conflicts among the circuits--in some cases, multiple conflicts--on three of the seven questions presented by the Petition (Opp.11-12, 15-17, 18-19, 21n.5). On the remaining four questions, the Government implicitly concedes (by failing to cite any supportive authority) that there is no other decision, in this Court or in any other court, that supports the rulings of the courts below. In both respects, the Government does not deny the importance of the questions presented. Rather, the Government mostly argues the merits, which is premature at this stage, and unresponsive to the Court's criteria for granting certiorari. Thus, perhaps the strongest ground for certiorari in this case is the Government's obvious inability to suggest any valid reason for declining review, for this case is one of the most extraordinary and, if unreviewed, potentially destructive, ever to come before this Court. It should be heard on the merits.

From the formulation of the Government's theories of prosecution through and including the mode of disposition on appeal, this case

is extraordinary and in some ways wholly unprecedented. The Government's brief does not deny these features, and it is silent in the face of their far-ranging implications, which threaten to rip apart the balance of federal and state powers, to undermine personal and professional autonomy, to chill free scientific thought, and to subvert the rule of law to the twin drives of federal prosecutorial excess and media sensationalism. It is precisely the constitutional role of this Court, as the guardian of our fundamental legal structures, to hear such cases.

## I. The Encroachment of Federal Prosecution Upon State Regulatory Powers, Procreative Privacy, and Free Scientific Thought

On the first two questions presented (Pet.16-24), the Government's brief (Opp.8-11) completely fails to address the implications of the decision below for the structures of federalism, individual rights to procreative privacy, and a sensible approach to the clash of criminal law enforcement with scientific thought. Instead, the Government misstates the record and the questions presented.

### A. The Government's Default of Response on the Key Points

As is often the case in adversarial presentation, the Government's brief is perhaps more revealing for what it fails to include than for what it does contain.

The Petition challenged the Government by noting that this case is "the first and only instance in which a physician has been convicted of federal criminal fraud on the basis of a direct governmental attack on the practice of medicine itself," and indeed was "the first and only case in which a physician has been convicted of *any* federal crime on the basis of any conduct that has not been shown and found, under appropriate jury instructions of the type that were refused here, to have been outside the scope of the professional practice of medicine." (Pet.2). In response, the Government does not deny these points, and cites no prior case of any kind involving such a situation, or in any way supporting the theory of prosecution here.

Furthermore, the Government does not deny any of the

implications of these facts for the development of federal law and the erosion of state authority and individual autonomy. The Government does not deny the established "practice of medicine" exception recognized under federal regulatory statutes (*see* Pet.20); it does not dispute that ignoring that restriction has profound implications for the displacement of state civil tort and regulatory law by federalized and criminalized standards (*see* Pet.18); it does not contest the implication that, as a result of the decision below, personal procreative decisions to create and sustain new life now have less constitutional protection than decision to terminate pregnancies by abortion (*see* Pet.20-21). Rather, the Government's brief here represents the endorsement of that agenda at the highest levels of the Executive Branch.

Nor does the Government deny the fact, amply documented in the published medical and scientific literature (*see* Pet.13-15), that Dr. Jacobson's theories and methods of infertility treatment, including those attacked by the Government's expert witnesses at trial as "unthinkable" (JA1264, Dr. Damewood),[1] "worthless" (JA917, Dr. Braunstein), and "inappropriate" (JA918, Dr. Braunstein), are now being vindicated by scientific research--including a paper published after trial by one of those very same witnesses (*see* Pet.15 &n.21)--and adopted in medical practice. Rather, the Government apparently proceeds on the view that scientific knowledge should be subverted to official orthodoxy, enforced through criminal prosecution.

**B. The Government's Misstatements of the Record and the Questions Presented**

Instead of addressing the key points forthrightly, the Government seeks to avoid their effect by misstating the record and the issues:

1. The Government argues that its case did not attack Dr. Jacobson's methods of treatment, but only "false representations concerning the nature and effect of his treatments" (Opp.9). The Government cites nothing from the record to support this

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[1] Citations to "JA-" are to pages of the Joint Appendix in the court of appeals.

distinction, and understandably so, because there is nothing.[2] Indeed, the court of appeals obviously thought otherwise, because it characterized the Government's case as predicated on showing that Dr. Jacobson "overexposed" his patients to hormone treatments (Pet.3a), thus implying the existence of some acceptable level of exposure, which in fact was the Government's case.

Merely on its face, the Government's distinction obviously is flimsy: the distinction between attacking a treatment and attacking representations as to that treatment's "nature and effect," is, to say the least, a distinction without much difference in operational effect. But even assuming some theoretical distinction, the Court should ask itself how the Government purported to show the "true" state of the "nature and effect" of the treatment, and the "falsity" of the representations. The answer is the obvious: by attacking the treatment itself, as the court of appeals recognized.

But even more fundamentally, it does not matter to the question presented what the evidence could be interpreted to show, because the error committed was in instructing the jury. Even the Government's gossamer distinction here was unknown to the jury, which was instructed completely without regard to the medical and scientific context of the case (*see* Pet.11).

2. Furthermore, the Government's attack on Dr. Jacobson's method of treatment was carried out wholly through expert testimony, which was met by conflicting testimony by defense experts, thus framing the second question presented by the Petition (*see* Pet.21-24). The Government's brief seeks to evade this issue with a triply misleading presentation:

First, the Government misstates the record as involving "virtually no conflict among expert witnesses concerning the appropriateness of petitioner's course of treatment for specific patients" (Opp.10). This statement is false. Both generally and as to specific patients,

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[2] Aside from its references to materials contained in the Appendix to the Petition, and to the Pre-Sentence Report (Opp.6), the Government's brief fails to contain a single citation--on any subject--to any material that was part of the record in the court of appeals or the district court. Instead, the Government's brief predicates its assertions of fact and evidence solely on its own prior brief in the court of appeals.

there was a sharp dispute between the prosecution and defense experts. Dr. Jacobson's use and dosage of HCG was attacked by prosecution expert Dr. Braunstein as "worthless" and "inappropriate" (JA917-18), and supported by defense expert Dr. Harrison as "perfectly good medicine" (JA1693). Dr. Jacobson's observation of a high rate of miscarriage and his theory of resorption, attacked by prosecution expert Dr. Damewood as "unheard of" (JA1257-59), was confirmed by defense experts Drs. Harrison and Campbell, on the basis of scientific studies (JA1685-87, 1777, 1943-44). On the question whether HCG caused false positive pregnancy test results or symptoms, prosecution expert Dr. Braunstein contended that "[t]here was no way he [Dr. Jacobson] could not have known" (JA936-37), while defense expert Dr. Harrison testified that the effects were "possible, but not probable" (JA1776) and that false positive test results could be attributable to a change in the tests' sensitivity of which Dr. Jacobson was unaware (JA1771-72). In every way, the medical principles and methods were sharply disputed.

Second, the Government seeks to emphasize "specific" patients rather than Dr. Jacobson's general approach in order to obscure the fact that the Government's theory was conclusively *dis*proved at trial. The theory of the Government's case was never that Dr. Jacobson misdiagnosed a few isolated sonograms or pregnancy tests, but rather that his entire course and method of treatment was a "scheme" and therefore a "fraud." That theory was disproved by the fact that Dr. Jacobson used the same techniques on all 1,000 of his fertility patients, that some 400 live births were achieved from that group, but less than 20 individual cases were attacked by the Government, which never explained how Dr. Jacobson could have distinguished out that group. (*See* Pet.8-9).

In any event, the Government here again misstates the record, which in fact shows sharp disagreements between the prosecution and defense experts on each of the specific incidents, as the defense experts were cross-examined in detail on those incidents, and they did not agree with the prosecutor. (*See* JA1739-77 (Dr. Harrison); 1949-2036 (Dr. Campbell)).

Third, the Government's argument of agreement on specific episodes of "medical fact" (Opp.10), aside from being a

misstatement of the record, complete misses the point of the question presented, which did not focus on the underlying "fact"--if any--but on Dr. Jacobson's state of mind. The question as presented is whether a finding of "criminal intent" may be predicted on conflicting expert testimony (Pet.i). As to that question, which is the one presented, the Government's brief says nothing, although its case rests necessarily on testimony like Dr. Braunstein's contention of what Dr. Jacobson "should" or "must" have known.

**C. The Need for Guidance from this Court**

In sum, the Government's brief provides this Court with no valid reason for denying review on these questions, and an additional ground supporting review. By failing to address the broad implications of the decision below, the Government concedes that those implications are present and are favored by the Executive Branch, which now can use a denial of review in this case as the predicate for an entirely new edifice of federal medical regulation through the criminal prosecution of physicians. The significance of that development would alone justify certiorari in this case.

But the Government's argument on the second question presented, regarding the use of expert testimony to convict for "fraud" on the basis of disagreement, has even broader implications. In essence, the Government argues that this Court's prior decisions in *Magnetic Healing* and *Reilly v. Pincus* set up a dichotomy under the federal fraud statutes between "two widely held schools of opinion" and "crystallized" scientific knowledge for purposes of using expert testimony to show fraudulent intent. (Opp.9-10). Of course, the application of such a dichotomy to rationalize the result in this case would be upside down: whereas the Court in *Reilly* was contrasting "crystallized" knowledge with continued adherence to a "thoroughly discredited" theory, here it is the testimony of the Government's experts that has been discredited by scientific research. More fundamentally, however, the Government's interpretation of these authorities as creating a group-think mentality of science is completely at odds with the true nature of scientific progress, as was recognized by this Court last term in its *Daubert* decision (*see* Pet.21). To the extent that the Government's interpretation may influence future prosecutions, this Court should grant review also to

re-examine the implications of *Reilly* and reaffirm the principle of *Magnetic Healing*, for otherwise, the future of free scientific thought will itself be imperiled.

**II. The Conceded Conflict on "Reasonable Doubt"**

The Government concedes that there is a conflict on the question whether "reasonable doubt" should be defined for a federal criminal jury (Opp.11-12), but argues that there is a "clear trend of recent authority in the federal courts" (Opp.12) against giving a definition. We disagree with the Government's argument of a "trend," as the case in those circuits upholding or recommending a definition are equally or more recent than those expressing reluctance (*see* Pet.24-25). But in any event, even if there were such a "trend," it would argue in favor of review at this time.

Apparently, the Government seeks to proffer the D.C. Circuit's recent decision in *United States v. Taylor*, 997 F.2d 1551 (D.C. Cir. 1993) as emblematic of its "trend." In that case, the D.C. Circuit shifted toward the view that "the greatest wisdom may lie" with the Fourth and Seventh Circuit position that juries should not given a definition. The *Taylor* court's reasoning obviously was influenced by this Court's recent decisions on review of state court definitions of reasonable doubt, *see* 997 F.2d at 1557-58, most notably the decision in *Sullivan v. Louisiana*, - U.S. -, 113 S. Ct. 2078 (1993), holding that deficient reasonable doubt charge is never harmless error. Thus, the logical conclusion of the *Taylor* court's reasoning is that a definition may lead to reversible error while a complete failure to define is not. That is certainly "wisdom" if the only objective is to minimize the prospect of reversal by a higher court. But whether it is "wisdom" in terms of the fundamental fairness of the federal criminal justice system is an entirely different matter--one that, given the incentives of the lower courts, can only be resolved by this Court.

**III. Public Confrontation with an Anonymous Mask?**

The Government's presentation on the Fifth and Sixth Amendment issues (Opp.12-14) only underscores the completely bizarre and unprecedented nature of the procedures followed at Dr. Jacobson's trial, for which the Government cites no supportive

precedent. Public confrontation and anonymous accusation simply cannot coexist, and anonymous accusation is outlawed by the Constitution. . . . Whether the constitutional protection can be outweighed by "higher values" than the accused's right to a fair and public trial, and whether such "higher values" include the privilege of anonymous accusation itself--for nothing else was involved here--are issues that should be decided by this Court.

**IV. The Sentencing Guidelines Issues**

1. The Government concedes that the upward departure on sentencing involves conflicts among the circuits as to both the required quality of proof of the departure factors and the appropriate basis for determining the magnitude of the upward departure. (Opp.15-19; *see* Pet.27-29). Both issues are obviously important to the effective operation of the sentencing guidelines system, and the Government does not argue otherwise.

Instead, the Government argues that "this case does not present a suitable vehicle" (Opp.19) apparently on the view that the magnitude of the upward departure was not sufficiently dramatic (Opp.17), or involved factors inadequately quantifiable (Opp.19). We disagree, and suggest that both of these factors actually make the case more appropriate a vehicle for providing guidance to the courts of appeals, as they provide more variations that the Court may address in this context. Furthermore, as the Government fails to note, the sentencing here involved no analysis whatsoever supporting the magnitude of the upward departure, and thus presents the polar case of its kind, directly raising the question whether a district court may depart upward to a level that is not justified by any reasoning at all in terms of its magnitude.

2. The Government also concedes, in essence, that the Ninth Circuit's *Niven* decision stands in opposition to the Fourth Circuit's decision below on the question whether dual guidelines and pre-guidelines sentencing for the same conduct violates the Double Jeopardy Clause (*see* Opp.19-21; *see also* Pet.29). Although the Government seeks to shade its concession by pointing to a dictum in the *Niven* decision concerning concurrent sentencing (Opp.20), in fact that analysis does not remove the constitutional problem presented by this case.

First, the imposition of concurrent sentences does not render the decision below "fully consistent" with *Niven*, as the Government argues (Opp.21), because the decision here, unlike *Niven*, failed to recognize any Double Jeopardy problem at all. This substantial constitutional question, supported by sister Circuit authority but of first impression to the Fourth Circuit, was one of those dismissed summarily by the court of appeals as "wholly without merit and therefore warrant[ing] no discussion on our part." (Pet.11a).

Second, as was noted in the Petition (Pet.29), concurrent sentences do not eliminate the Double Jeopardy problem, because guideline and pre-guideline sentences are legally distinct and have disparate practical consequences for time served, because exclusion of the loss caused by the pre-guidelines counts, as required by the Double Jeopardy Clause and *Niven*, necessarily reduces the guideline sentence, and therefore the time actually served. In a footnote, the Government's brief recognizes this point, but argues that the question is "of no continuing importance, as it arises only in a rapidly diminishing number of cases" (Opp.21n.5). Of course, the issue is of some "continuing importance" to Dr. Jacobson, who now is incarcerated in a federal prison camp, as well as all the other prisoners similarly incarcerated. And we do not agree that a violation of the constitutional rights of defendants in even a "diminishing number" should be considered a matter of "no continuing importance" to this Court. But, in any event, the Government is wrong in its suggestion that the issue is merely a matter of transition from non-guidelines to guidelines sentencing, because the same problem will recur with current and future changes to the guidelines, which can and have changed the weight assigned to sentencing factors such as loss, and thereby present exactly the same issue repeatedly.

Third, both in the future replications and in this case, the same feature raises the question whether the Ex Post Facto Clause also is violated, as this feature of the guidelines, whether applied to pre-guidelines conduct or to any other offense completed prior to the implementation or a change in guidelines, does in fact raise the sentence attributable to a completed offense, which is precisely what is prohibited by that Clause. In this respect, the ongoing problem is even more severe, as the impact of the retrospective change will

be all the more clear under a guidelines system.

**VI. Supervision of the Courts of Appeals**

Finally, the Government opposes (Opp.21-22) review by this Court of the question whether the courts of appeals will be held to any minimum standard of conduct in their disposition of federal criminal appeals. The Government cites no decision on point by this Court, and its reliance on a quotation from a court of appeals as to its own powers (Opp.22) only underscores the need for supervision in this area.

At a time when the number of cases reviewed in this Court has been declining, it is all the more important for this Court to exercise its opportunities to provide meaningful supervision to the courts of appeals. The twenty-year experiment with self-enforced local circuit rules has not been successful, and this Court should take a hand in providing uniform guidance, at least in terms of establishing minimum standards for the quality of appellate justice in the United States courts of appeals in criminal cases.

**Conclusion**

For the reasons stated above and in the Petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

April 26, 1994

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